

04A3FRO1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 FRONTIER AIRLINES, INC.,

4 Plaintiff,

5 v.

20 Civ. 9713 (LLS)

6 AMCK AVIATION HOLDINGS IRELAND
7 LIMITED, ACCIPITER INVESTMENT
8 4 LIMITED, VERMILLION AVIATION
(TWO) LIMITED,

9 Defendants.

10 Bench Trial

11 New York, N.Y.
12 April 10, 2024
11:00 a.m.

13 Before:

14 HON. LOUIS L. STANTON,

15 District Judge

16 APPEARANCES

17 LANE POWELL PC
Attorneys for Plaintiff
18 BY: DAVID G. HOSENPUD
AARON SCHAER

19 CLIFFORD CHANCE US LLP
20 Attorneys for Defendants
21 BY: JEFF E. BUTLER
JOHN P. ALEXANDER
22 RISHIKA JIKARIA
GINA CROSBY

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Fanning - Cross

1 (Trial resumed; in open court)

2 THE COURT: Good morning. Please sit down.

3 We'll work Friday morning and finish at midday. Then
4 I'll do some conferences in the afternoon. And I think that's
5 a good compromise. You get some extra time out of it.

6 MR. ALEXANDER: Thank you, your Honor.

7 ROBERT FANNING,

8 having been previously sworn, testified as follows:

9 CROSS-EXAMINATION

10 BY MR. ALEXANDER:

11 Q. Good morning, Mr. Fanning.

12 A. Good morning.

13 Q. You testified yesterday about a 10-day grace period that
14 AMCK agreed to on April 6, 2020. Do you recall that?

15 A. I do.

16 Q. And that was from an e-mail from Paul Sheridan; is that
17 right?

18 A. That is correct.

19 Q. I'd like to show you Joint Trial Exhibit 69. And this
20 is -- do you understand that this is a text message
21 conversation on April 6, 2020, involving you, Mr. Thwaytes, and
22 Mr. Dempsey?

23 A. Yes.

24 MR. ALEXANDER: Your Honor, I'd move to admit Joint
25 Trial Exhibit 69.

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Fanning - Cross

1 MR. HOSENPUD: No objection.

2 THE COURT: Received.

3 (Joint Exhibit 69 received in evidence)

4 Q. So calling your attention to page 3 of the document which
5 is up on the screen. And if you look at the last message, you
6 can see there it's from you on April 6, 2020, at 1:38 p.m. Do
7 you see that?

8 A. I do.

9 Q. And you state, "Paul Sheridan will sending your an e-mail
10 deferring all rent payments for 10 business days to give us
11 room to work out a solution."

12 Do you see that?

13 A. I do.

14 Q. Were you reporting on a phone call that you had had with
15 Mr. Sheridan that day?

16 A. That is correct, yes.

17 Q. And what did Mr. Sheridan say on that phone call?

18 A. To the best of my knowledge, it was regarding -- my
19 recollection was that Jimmy was still talking to Airbus. The
20 discussions were still going based on the request from AMCK.
21 And we were updating Paul as to where that status was and what
22 progress Mr. Dempsey had made with Airbus, and the request was
23 made that we need more time in order to work out the
24 negotiations with Airbus to push the aircrafts further beyond
25 the current delivery dates. And going -- not remembering the

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Fanning - Cross

1 exact conversation that Mr. Sheridan -- the way that it was
2 stated, but ultimately, it was agreed at that point in time,
3 based on the situation, that we knew that Mr. Sheridan had
4 agreed to a deferral of 10 days.

5 Q. Did Mr. Sheridan say on that call that he would be sending
6 an e-mail to confirm?

7 A. I know he did, but to the best of my knowledge, I do not
8 recall.

9 Q. In your text message to your colleagues at Frontier, you
10 told them that Mr. Sheridan would be sending an e-mail. Is it
11 fair to assume that you understood that because that's what
12 Mr. Sheridan said?

13 A. That is correct.

14 Q. I'd like to show you Joint Trial Exhibit 60, which is a
15 copy of Mr. Sheridan's April 6, 2020, e-mail.

16 And I believe you testified about this document
17 yesterday. Do you recall that?

18 A. Yes.

19 Q. And at the top of the e-mail is an e-mail from you to
20 Mr. Sashikumar Bindu on April 6 at 6:11 p.m. Do you see that?

21 A. Yes.

22 Q. It looks like you're forwarding a copy of Mr. Sheridan's
23 April 6 e-mail from earlier that day. Right?

24 A. Yeah.

25 Q. And this was the e-mail where Mr. Sheridan confirmed that

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Fanning - Cross

1 AMCK would provide a 10-business-day deferral, correct?

2 A. Correct.

3 Q. In the above e-mail, you're forwarding this message to
4 Mr. Sashikumar, correct?

5 A. That is correct.

6 Q. Why were you sending that to Mr. Sashikumar?

7 A. We weren't in the office at this time. And I wanted to
8 keep Sharath, I wanted to keep Sharath apprised of what was
9 going on at the time, and he had the e-mail that we had the
10 10-day stay at that time with AMCK.

11 Q. Why did you want to keep Mr. Sashikumar apprised of these
12 things?

13 A. He works for me, and we were -- it was just part of the
14 process that we shared e-mails that we weren't copied on.

15 Q. Was Mr. Sashikumar responsible for making payment to
16 lessors?

17 A. So, Sharath would have been responsible for sending the
18 approval e-mails to me, for me and Mr. Thwaytes to approve.

19 Q. And you thought it was worth informing him about this
20 10-day deferral, correct?

21 A. Well, yeah, we worked together. He needs to know what's
22 going on. We have many deferral requests at that time, so he's
23 kept informed of what's going on.

24 Q. And he's kept informed because his role is getting approval
25 for making payments to lessors, right?

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Fanning - Cross

1 A. Yeah, but that's not the reason it was sent to him.

2 Q. So then why did you send it to him?

3 A. As I stated, so we had many deferral requests ongoing
4 during this time. He needed to be kept in the loop as to what
5 the agreement was with AMCK.

6 Q. Let's look at Joint Trial Exhibit 67. This is an April 6,
7 2020, message from you to it looks like Mr. Sashikumar, and I
8 believe you testified about this document yesterday. Do you
9 recall that?

10 A. Yes.

11 Q. And you tell Mr. Sashikumar, "All Accipiter rent payments
12 are deferred for the next 10 business days." Is that right?

13 A. That's right.

14 Q. Why were you sending this message to Mr. Sashikumar?

15 A. To the context of why this e-mail was sent, I do not
16 recall. But it was, again, for the same reasons I sent the
17 previous e-mail and forwarding to him. He may have been just
18 notifying our accounting and treasury department to stop the
19 payments for the next 10 business days with AMCK, if any were
20 due during that time.

21 Q. You thought he should know the status of the deferral
22 discussions with AMCK?

23 A. That would be correct.

24 Q. Mr. Fanning, I'd like to step back and ask some more
25 general questions about Frontier's rent deferral request.

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Fanning - Cross

1 You testified yesterday that on March 16, 2020,
2 Frontier sent a concession letter to AMCK that spelled out the
3 terms of the rent deferral that Frontier was requesting.

4 Right?

5 A. Correct.

6 Q. And that letter included a proposed deferral of three
7 months' rent. Do you recall that?

8 A. Yes.

9 Q. And so, that would have meant Frontier did not have to pay
10 rent for April, May, or June 2020, right?

11 A. That is correct.

12 Q. You testified that Frontier also reached deferral
13 agreements with other of its lessors, right?

14 A. Yes.

15 Q. Generally speaking, what was the length of the deferral
16 periods for those deferrals?

17 A. So typically, so, in the mainstream of the deferrals they
18 were done fairly quickly, within two to three weeks. There
19 were some that went out and extended beyond about two months,
20 and then there were one or two that extended beyond I
21 believe -- it was six months before they were signed.

22 Q. Understood.

23 You testified yesterday about a month-to-month
24 deferral agreement between AMCK and Frontier. Do you recall
25 that?

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Fanning - Cross

1 A. I do.

2 Q. You testified that that was something that was agreed to
3 between Mr. Dempsey and Mr. Sheridan on an April 7 phone call,
4 right?

5 A. Yes.

6 Q. And you were not on that phone call, were you?

7 A. I was not.

8 Q. So is it fair to say that everything you know about that
9 agreement came from Mr. Dempsey?

10 A. Yes.

11 Q. I'd like to put up Joint Trial Exhibit 73. And
12 Mr. Fanning, this is a document that you looked at yesterday.
13 It is an April 7 text message. And what we have up on the
14 screen here is the message from Mr. Dempsey on April 7. Do you
15 see that?

16 A. Yes.

17 Q. And Mr. Dempsey said, "Just spoke to Paul Sheridan. He has
18 agreed to do the deferral on a month-to-month basis." Right?

19 A. Yes.

20 Q. Okay. Now do you understand that this was a text message
21 exchange between you and Mr. Dempsey, right?

22 A. That is correct.

23 Q. I don't believe you were asked about it yesterday, but I'd
24 like to show you your side of this conversation which is on the
25 next page of this document.

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Fanning - Cross

1 Now, do you see here, Mr. Fanning, that at the top of
2 the page you have a message to Mr. Dempsey and Mr. Thwaytes on
3 April 7, 2020? Do you see that?

4 A. I do.

5 Q. Now, what we're going to do is put up on the screen the
6 first page of that exhibit and the second so you can see what
7 Mr. Dempsey was saying and what you were saying.

8 Just zooming that out so it's visible.

9 On the top-left-hand side of the exhibit, you can see
10 Mr. Sheridan's text at 10:33 a.m., right?

11 A. That is correct.

12 Q. And you testified about your understanding of what
13 Mr. Dempsey meant yesterday. Correct?

14 A. That's correct.

15 Q. We'll come back to that. But right now I'd like to ask you
16 about your response which is on the right side of the screen.
17 Do you see you responded at 10:59 a.m.?

18 A. I do.

19 Q. And you said, "Okay, good. Anything mentioned on the
20 repayment period? And are they going to send our revised
21 agreement over?"

22 Do you see that?

23 A. That is correct.

24 Q. So, let's just break that down a bit. In the first
25 sentence of your message, you said, "Okay good, anything

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Fanning - Cross

1 mentioned on the repayment period?"

2 What did you mean by that?

3 A. Well, as we had initially stated in our deferment
4 agreement, we were looking for three months. I wanted to
5 confirm that that was in line with the deferment agreement that
6 we had sent over, that Mr. Thwaytes had sent over to AMCK.
7 Since the conversations between Jane and Paul had shifted, I
8 wanted to be on whether it was discussed with Mr. Sheridan, if
9 Jimmy and Mr. Sheridan had discussed it.

10 Q. And the subject you were asking about was when the rent
11 would have to be repaid, right?

12 A. Well, I look at it differently. We requested three months.
13 That was part of the negotiations at that time. That's not the
14 way that I would have interpreted the way that I asked that
15 question.

16 Q. So how do you interpret the way you asked that question?

17 A. I would have interpreted it, like I said, I just needed to
18 understand if this was something that Mr. Dempsey and
19 Mr. Sheridan had discussed. There was a lot of discussions
20 going on at that time. I just wanted to be clear that I knew
21 exactly what they discussed. That's why I asked the question.

22 Q. You used the word "repayment period." Didn't that refer to
23 the time period when the rent would be repaid?

24 A. That is correct.

25 Q. In the next sentence of your message, you say, "And are

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Fanning - Cross

1 they going to send our revised agreement over?"

2 What did you mean by that?

3 A. Well, you know, so, so they had our agreement, I wanted to
4 understand, based on the conversation Mr. Dempsey and
5 Mr. Sheridan had, if the agreement that they had made was going
6 to be sent over to us to review.

7 Q. When you said "they had our agreement," who are you
8 referring to?

9 A. Sorry. AMCK.

10 Q. And AMCK had your agreement. What was your agreement?

11 A. Well, it was the original request that was made on
12 March 16.

13 Q. Do you recall testifying yesterday that Frontier's lawyers
14 had sent a couple draft agreements to AMCK?

15 A. Yeah, that is correct.

16 Q. So when you said AMCK had our draft agreement, is that what
17 you were referring to?

18 A. Yes.

19 Q. Now, let's go back to the left side of the screen, and see
20 how Mr. Dempsey responded to you.

21 At 11:03 a.m., Mr. Dempsey said, "No, but we should
22 stick to nine months from July 1st. Let's get a draft to him."

23 Do you see that?

24 A. Yes.

25 Q. So, in the first sentence of Mr. Dempsey's response, did

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1 you understand him to be saying that no, nothing had been
2 mentioned about the repayment period?

3 A. Based on Mr. Dempsey's text, this was just part of, again,
4 of what he requested that we go back to them with. Given that
5 it wasn't unusual for us -- it wasn't unusual for us to ask for
6 a longer period. Mr. Dempsey was aware of these deferment
7 requests that had gone out. But he wasn't in the detail as to
8 how many months, and that was his opinion that we should go out
9 and request nine months.

10 Q. Well, I asked you a different question, which is in
11 response to your question to Mr. Dempsey, "Anything mentioned
12 on the repayment period?" He answered, "No, but we should
13 stick to nine months from July 1st."

14 Did you understand Mr. Dempsey to be saying no,
15 nothing had been mentioned on the repayment period?

16 A. That is correct.

17 Q. Mr. Dempsey refers to nine months from July 1 period there.
18 Was that the repayment period Frontier had requested in its
19 rent deferral request to AMCK?

20 A. No.

21 Q. What was the repayment period that Frontier requested from
22 AMCK in its rent deferral request?

23 A. Frontier originally requested three months.

24 Q. Well, Mr. Fanning, maybe we're having a difference in
25 terminology.

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Fanning - Cross

1 In the original March 16 letter, was Frontier
2 requesting to defer the rent owed for the three months of
3 April, May, and June?

4 A. That is correct.

5 Q. And Frontier was proposing to repay those deferred amounts
6 over nine months, starting in July 2020, right?

7 A. Right.

8 Q. So, the nine months from July 1 was the repayment period
9 referenced in Frontier's request for a rent deferral, correct?

10 A. Correct.

11 Q. Mr. Dempsey said we should stick to nine months from
12 July 1st, right?

13 A. That's what he says. That's what Mr. Dempsey said.

14 Q. Did you understand him to mean that was the repayment
15 period he wanted?

16 A. Well, the -- well, the reason why Mr. Dempsey asked for
17 nine months was because he was discussing with Airbus, and he
18 needed time in order to, based on the requests made by AMCK, he
19 needed time in order to negotiate the request that was made by
20 AMCK to defer the aircraft.

21 So, Jimmy thought that -- due to the -- due to the
22 ongoing discussions with Airbus, he may need more time in order
23 to -- he -- we may need more time in order to extend the
24 deferment payments out from three to nine months.

25 Q. So, if I understand you correctly, the reason that

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1 Mr. Dempsey wanted to stick to that position was because of the
2 time it would take to negotiate with Airbus?

3 A. It was ongoing. We didn't know -- right. So at this point
4 Mobile, Alabama, the Airbus facility had closed down.

5 Mr. Dempsey had gotten notification. There was an indefinite
6 period of -- nobody knew exactly when it would open up. And I,
7 just knowing Mr. Dempsey, I assumed he wanted, needed more time
8 in order to make those payments, which is why he mentioned in
9 his text to stick to nine months. He was having conversations
10 with Airbus that I wasn't aware of.

11 Q. But whatever the reason for Mr. Dempsey's view, Mr. Dempsey
12 was saying that was the repayment period he wanted you to stick
13 to, right?

14 A. Yes.

15 Q. In the second sentence of Mr. Dempsey's message, he says
16 "let's get a draft to him." Do you see that?

17 A. I do.

18 Q. What did you understand that to mean?

19 A. Based on the request that Mr. Dempsey had made to stick to
20 nine months, he wanted Frontier -- us -- to get a draft to
21 AMCK.

22 Q. To get a draft agreement to AMCK?

23 A. Yes, yes.

24 Q. And let's look over at the right-hand side of the screen
25 again to see how you responded to Mr. Dempsey.

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Fanning - Cross

1 At 11:04 a.m. you said, "They have our draft. I'll
2 follow up with Jane." Do you see that?

3 A. I do.

4 Q. What did you mean by that?

5 A. Well, at that time, I was aware they had our draft, and I
6 was going to follow up with Jane. The mention was I discussed
7 with Jimmy and see if it was something we could -- if we could
8 agree and let her know what our intentions were, based on the
9 conversation I had with Mr. Dempsey.

10 Q. When you said "they have our draft," were you referring to
11 one of the draft agreements that Frontier had sent to AMCK?

12 A. That is correct.

13 Q. Do you remember speaking to Ms. O'Callaghan about this
14 month-to-month agreement?

15 A. Well, I had many conversations with Jane. I don't
16 specifically remember having that conversation.

17 Q. So, Mr. Dempsey responded to you, on the left-hand side of
18 the screen at 11:04 a.m., "He was going to call Jane after we
19 spoke." Do you see that?

20 A. Yes.

21 Q. Did you understand that to mean that Mr. Sheridan was going
22 to call Ms. O'Callaghan?

23 A. That is correct.

24 Q. Let's take a step back for a second.

25 In this exchange between Mr. Dempsey and you, you were

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Fanning - Cross

1 asking questions about Mr. Dempsey's discussion with Paul
2 Sheridan, right?

3 A. Yes.

4 Q. And so, as you testified earlier, your information about
5 that month-to-month agreement came from Mr. Dempsey, right?

6 A. That is correct.

7 Q. Apart from this text message exchange, do you remember
8 hearing from Mr. Dempsey anything about this supposed
9 month-to-month agreement?

10 A. So, I would have recalled in conversation, but
11 specifically, I don't remember.

12 Q. I'm not sure I understood the first part of your answer.

13 A. I would have had many conversations and phone calls, not
14 just with AMCK, but other lessors on what was going on. To my
15 recollection, as best as I can remember, we may have discussed
16 it. But beyond the context of the text and the conversations,
17 we would have discussed it just simply because this was
18 important for us to get AMCK committed to a month-to-month.

19 Q. Well, we have the text exchange here. You mentioned
20 conversations with other lessors. But, those weren't informing
21 you about the month-to-month agreement that Mr. Dempsey was
22 talking about, right?

23 A. Right. But other lessors weren't asking us for -- weren't
24 asking for the type of request that AMCK were making. Most
25 lessors -- under the relationship that we had with them, gave

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1 us the relief that we requested. They didn't ask for any
2 additional asks. AMCK made additional asks, which is why Jimmy
3 had to speak to Airbus in order to accommodate their request.
4 We needed time, which is why Mr. Dempsey had asked for a
5 month-to-month.

6 Q. I'm asking you about what Mr. Dempsey told you, if
7 anything, about this month-to-month agreement on the April 7
8 phone call with Paul Sheridan.

9 A. As I stated, I had many conversations with Mr. Dempsey. Do
10 I recall a conversation about a month-to-month on the phone? I
11 do not.

12 Q. So, just to understand, it's your testimony that you had
13 many conversations with Mr. Dempsey, but you can't remember any
14 conversation about this agreement. Is that right?

15 A. No, the conversations -- so, on record knowing the
16 conversations I had with Mr. Dempsey, I would have been aware
17 we would have had a conversation. But today, 4 years later, I
18 do not recall a conversation.

19 Q. And just to clarify the term, you said you would have
20 spoken to Mr. Dempsey about it. But you don't actually recall
21 any discussion with Mr. Dempsey about it?

22 A. That is correct.

23 Q. How do you understand that this month-to-month agreement
24 would work in practice?

25 A. So, the reason why Mr. Dempsey asked for a month-to-month

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1 was because Airbus had notified Mr. Dempsey that the factory
2 was going to shut down. They had -- they didn't have a date,
3 so it was indefinite of when they were going to open. They
4 weren't aware of when they were going to reopen in order to be
5 able to deliver the aircraft.

6 So Mr. Dempsey, you know, asked Mr. Sheridan for a
7 month-to-month, given we know Airbus, it was reasonable to
8 assume within a relatively, you know, short period of time,
9 anywhere from one to four months, they were going to reopen.
10 And my assumption is that's the reason why he asked, was we
11 needed time in order to talk to Airbus.

12 Airbus were talking to many airlines. We were just
13 one airline making the request to push the aircraft out as far
14 as we could, given the requests from AMCK. So in order to do
15 that, we needed time.

16 Q. I understand why Frontier wanted time. But, my question
17 is, how did this month-to-month agreement work in practice?
18 What were the terms of that agreement?

19 A. The terms of the agreement, the way I understood it, that
20 for every month, so, starting in April, May, June, we would
21 have a deferral on a month-to-month basis.

22 Q. And you said starting in April, May, and June there would
23 be a deferral on a month-to-month basis.

24 What does that mean?

25 A. We would not pay rent during that time. There would be a

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Fanning - Cross

1 deferment on our obligation for the rent that was owed to AMCK.

2 It would be deferred for starting in April, May, and June.

3 Q. And was it a three-month deferral period then?

4 A. That is correct.

5 Q. And what was the month-to-month part of it?

6 A. I don't understand your question. Can you elaborate?

7 Q. Well, in this text message exchange, there is a discussion
8 about a month-to-month agreement.

9 What you just testified about was it sounded like a
10 three-month rent deferral. Right?

11 A. On a month-to-month basis.

12 Q. What do you mean by on a month-to-month basis?

13 A. So for every 30 days, we would not pay rent for up to three
14 months.

15 Q. So, for three months, Frontier didn't not have to pay any
16 rent, is that right?

17 A. No. It would be an ongoing discussion on a month-to-month
18 basis. So meaning that we're in communication with AMCK, the
19 agreement that Mr. Dempsey agreed with Paul Sheridan is that we
20 would be on a -- so for April, May, and June, on a
21 month-to-month, obviously Mr. Sheridan wanted to be kept
22 updated and Ms. O'Callaghan on our progress with Airbus based
23 on the AMCK request. So it would be on a month-to-month basis.
24 So for every 30 days, for up to three months, Frontier would
25 not pay, make any payments for the 14 aircraft.

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1 Q. Was it something that would be reevaluated each month?

2 A. It's possible. But, again, with the request that AMCK had
3 made, we needed up to three months in order to -- we needed up
4 to three months in order to get Airbus to where the requests
5 made by AMCK, and see exactly what we could do in terms of
6 pushing the aircraft to the right to get what AMCK had
7 originally requested, which was three to six months on
8 deliveries. So meaning that they wanted to delay the
9 deliveries by three to six months.

10 Q. And the month-to-month deferral agreement you're testifying
11 about, would allow Frontier not to the pay any rent for three
12 months, period, or there would be a discussion each month about
13 whether rent would be owed that month?

14 A. So, we didn't get into the context of how the mechanism
15 worked, but it was understood that we would not make any
16 payments for three months.

17 Q. You said we didn't get into the context of that. Who's
18 "we"?

19 A. That would have been obviously, I mean, obviously myself
20 and Jane and Mr. Dempsey speaking to Paul Sheridan, may have --
21 so, normally when something like this is discussed high level,
22 we get into the details as to what that -- it's negotiated in
23 the draft agreements. We didn't get into the context as to
24 what the month-to-month meant.

25 Q. And you talked about getting into the context with

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1 Mr. Dempsey or Ms. O'Callaghan. And you testified earlier you
2 don't remember speaking about a month-to-month agreement with
3 Ms. O'Callaghan. Right?

4 A. That is correct.

5 Q. And you don't remember any conversation with Mr. Dempsey
6 about a month-to-month agreement, correct?

7 A. Other than his text, but as I mentioned, I would have had
8 many conversations with Mr. Dempsey. But to be specific on
9 your question, I don't remember.

10 Q. So, you testified a little bit about your understanding of
11 how long Frontier didn't have to pay rent.

12 What was your understanding of when the deferred rent
13 would have to be repaid?

14 A. So, the understanding is, is that we needed time to speak
15 to -- we needed time to speak to Airbus in order to get a
16 position to where, based on AMCK's request, that we could delay
17 the aircraft as much as possible. These -- I guess the
18 thinking was that we would pay -- we would -- we would pay once
19 we knew the second delivery date, based on AMCK's request on
20 that we make full payment for the 14 aircraft before the second
21 delivery.

22 Q. And how did you come to that understanding?

23 A. It's noted in multiple e-mails and texts that it was a
24 condition that AMCK had made.

25 Q. But that wasn't anything that you heard about the

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Fanning - Cross

1 month-to-month agreement, was it?

2 A. Say that again?

3 Q. Well, your understanding of when rent should be repaid as
4 part of an overall agreement was not something you heard
5 discussed in connection with a month-to-month agreement on
6 April 7, correct?

7 A. I wasn't on the phone call. So, that was between
8 Mr. Dempsey and Mr. Sheridan.

9 Q. Do you know what interest rate would be applied to the
10 deferred rent covered by this month-to-month agreement?

11 A. Not to my knowledge, no.

12 Q. Do you know if interest rate was discussed between
13 Mr. Sheridan and Mr. Dempsey?

14 A. I do not.

15 Q. Did you expect that Frontier would have to pay interest on
16 any deferred rent amounts?

17 A. It wasn't discussed.

18 Q. But did you have an expectation, Mr. Fanning, that if any
19 rent amounts Frontier owed were deferred, they would be repaid
20 with interest?

21 A. Under normal circumstances, yes, that would be the case.
22 But it wasn't discussed as to what that interest rate would be.

23 Q. So is it fair to say there was no agreement on the interest
24 rate to be charged?

25 A. I wasn't part of the conversation between Mr. Dempsey and

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Fanning - Cross

1 Mr. Sheridan, so I can't answer that.

2 Q. Now, you testified a moment ago about your understanding
3 that the month-to-month agreement covered a three-month
4 deferral period. Is that right?

5 A. That is correct.

6 Q. And I believe you testified yesterday that you came to
7 learn that that was not actually what the month-to-month
8 agreement was. Was that your testimony?

9 A. Correct.

10 Q. And so today you have a different understanding of what the
11 month-to-month agreement was?

12 A. My understanding of the month-to-month was for up to three
13 months on a month-to-month basis.

14 Q. I believe you were asked yesterday: Did you come to learn
15 at any point in time that the month-to-month was to in some way
16 be tied to the delivery of aircraft; in other words, that rent
17 payments would resume before the delivery of aircraft? And you
18 answered: Yes, that is correct.

19 A. That's correct.

20 Q. At what point in time did you learn that that was the
21 month-to-month agreement?

22 A. It would have -- I would have learned based on the text
23 that Mr. Dempsey had sent on April 7.

24 Q. Well, you testified earlier that your understanding of
25 Mr. Dempsey's text was that it was a three-month deferral

04A3FRO1

Fanning - Cross

1 period. Right?

2 A. On a month-to-month basis.

3 Q. But you came to learn something different about what that
4 meant, is that right?

5 A. Look. My understanding was that the deferral was up to
6 three months on a month-to-month basis. There was a reason for
7 that. And that, like I said, had to do with the -- the Airbus
8 plant in Mobile, Alabama, shutting down, and we needed time to
9 work out with Airbus, based on the request that AMCK had made.
10 So we needed three months total, on a month-to-month basis.

11 THE COURT: Was it your understanding at that time
12 that the month-to-month basis meant at the beginning of each
13 month there would be a re-agreement that it would continue to
14 be deferred?

15 THE WITNESS: Yes, so, your Honor, so the 14 aircraft,
16 they have specific due dates, they have specific due dates
17 every month. So, it's not necessarily where you would have
18 maybe one aircraft or the third aircraft paid on the first of
19 every month. One aircraft may be paid on the 1st of let's say
20 April, and the third aircraft may be paid on the 10th. So it
21 would be recurring --

22 THE COURT: It might be different for each aircraft.
23 But it had to be renewed at the beginning -- the understanding
24 was it had to be renewed at the beginning of each of the three
25 months.

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Fanning - Cross

1 THE WITNESS: Your Honor, my interpretation was
2 that -- my interpretation was that we had a three-month
3 deferral but it was on a month-to-month basis. Just simply
4 because Mr. Dempsey was asking Airbus, based on the request
5 made by AMCK, to push the aircraft, basically defer the
6 deliveries for up to, you know, three to six months.

7 THE COURT: I'm trying to find out what month-to-month
8 meant in practical terms.

9 It's different from three months. It's a
10 month-to-month basis. And I take it that the difference is it
11 has to be renewed every month. Or does it simply mean they
12 have a right to call it off every month?

13 THE WITNESS: Mr. Sheridan --

14 THE COURT: What was your understanding at the time?

15 THE WITNESS: My --

16 THE COURT: That month-to-month meant.

17 THE WITNESS: To be specific, my understanding was for
18 every aircraft that was due on a specific date, the due date,
19 the payment date would be, for a period of three months, on a
20 month-to-month basis.

21 THE COURT: What does month-to-month basis mean?

22 THE WITNESS: Right.

23 THE COURT: What happened at the end of every month?
24 Anything or nothing?

25 THE WITNESS: It would have depended -- it would have

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Fanning - Cross

1 depended on when Airbus -- it would have depended on when
2 Airbus opened the facility.

3 THE COURT: I see. I see. It meant that it could be
4 changed if necessary because of something Airbus did.

5 THE WITNESS: Right. Because it was an unknown of
6 when the facility was going to open. They had initially put a
7 stop in production and building and delivering aircraft until
8 the end of April. But it was unknown as to when exactly the
9 factory would open, which is why Mr. Dempsey had asked for a
10 three-month deferral.

11 The other assumption was that the second aircraft was
12 going to deliver in May. Normally we get a delivery notice
13 from Airbus, but we had not got a delivery notice or some type
14 of notice from Airbus, because, your Honor, they didn't even
15 know when the factory was going to open. So we needed time.

16 THE COURT: So what it really meant was you might have
17 to adapt it before the end of the three months.

18 THE WITNESS: Yes.

19 THE COURT: Because of a development with Airbus.

20 THE WITNESS: Correct.

21 THE COURT: I see. It's an agreement subject to a
22 condition subsequent.

23 THE WITNESS: Correct.

24 THE COURT: Okay. Thank you. Excuse me.

25 MR. ALEXANDER: Thank you, your Honor.

04A3FRO1

Fanning - Cross

1 BY MR. ALEXANDER:

2 Q. Just to confirm, Mr. Fanning, your understanding that
3 you've been testifying about was not first-hand knowledge. You
4 were just basing that on what you received from Mr. Dempsey in
5 this text message on screen, correct?

6 A. That is correct.

7 Q. You testified a moment ago, Mr. Fanning, about the Airbus
8 facility in Mobile, Alabama, closing. Right?

9 A. Yes.

10 Q. When did it reopen?

11 A. So, I don't know the specific date as to when it reopened.
12 But, I'm aware it was closed all the way until the end of
13 April, I believe. April 29.

14 Q. So the month-to-month agreement was tied to that reopening?

15 A. No. We didn't know when the -- when the agreement between
16 Mr. Dempsey and Mr. Sheridan was made, Mr. Dempsey had no
17 knowledge of when exactly the factory would reopen. I mean, we
18 just did not know. As to when it opened, I don't have a date
19 as to specifically what date it reopened.

20 Q. But, that reopening was part of the agreement on April 7?

21 A. No. It was linked to the delivery of the second aircraft.
22 So, AMCK wanted the 14 payments made before the delivery date
23 of the second aircraft. That was unknown at that time as to
24 when that would to occur. At that point, again, AMCK were
25 asking for the aircraft to be pushed out beyond May, which is

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Fanning - Cross

1 what Mr. Dempsey was attempting to do at that time. So my
2 assumption, or based on the conversation I had with
3 Mr. Dempsey, that we would repay the 14 aircraft, each rent for
4 14 aircraft would be paid on the next delivery, whenever that
5 was going to occur.

6 Q. And when you referred to your conversation with
7 Mr. Dempsey, you're talking about this text exchange on screen,
8 right?

9 A. Well, I mean, again, we would have had conversations within
10 during this time. So, no.

11 Q. Well, you testified earlier that you did not remember any
12 conversations with Mr. Dempsey?

13 A. Specific to the context of the month-to-month. But I had
14 many conversations with Mr. Dempsey. He was talking to Airbus.
15 I needed to feed that information to Ms. O'Callaghan and from
16 time to time to Mr. Sheridan. So I needed to be kept up to
17 date as to what Mr. Dempsey was discussing with Airbus. This
18 was important to us.

19 Q. Because that was motivating your request for a deferral,
20 right?

21 A. No. We had -- we had no choice to -- I mean, the airline
22 wasn't making money at the time. It was a very fluid situation
23 as to what was going on with COVID. It was just unknown when
24 that delivery was going to happen.

25 But, I am aware that, and Jane made it very clear

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Fanning - Cross

1 throughout the course of April, that they would not take
2 delivery of the second aircraft until we caught up on all 14
3 rent payments.

4 Q. So I understand your testimony as to why Mr. Dempsey was
5 seeking a month-to-month deferral. But, your understanding of
6 that agreement about a month-to-month that you testified about
7 comes only from this text message exchange, right?

8 A. The way that you're asking me implies that I never had any
9 conversation with Mr. Dempsey. And I cannot state that I did
10 not have any conversation with Mr. Dempsey. I had daily
11 conversations with Mr. Dempsey. Within those conversations,
12 AMCK would have come up like any other lessor. He wanted to be
13 apprised and kept updated as to the progress that I was making
14 with our lessors. AMCK would have been part of that
15 conversation.

16 Q. Sure. But you don't remember any of those conversations
17 about this month-to-month agreement, do you?

18 A. I just want to be clear that I would have -- so 4 years on,
19 I do not remember. But I want to make it for the record that I
20 spoke to Mr. Dempsey multiple times on a daily basis, and this
21 would have been part of that conversation.

22 Q. When you say it would have been, you mean you assume it was
23 discussed?

24 A. If you're asking me today do I remember, no. But that's
25 not to state that I did not -- the way you are asking the

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Fanning - Cross

1 question infers I never spoke to Mr. Dempsey, and that is not
2 true. I did speak to Mr. Dempsey.

3 Q. Just not about the month-to-month agreement that you can
4 recall, right?

5 A. I don't recall. I don't recall. But it's not to state
6 that I did not speak to Mr. Dempsey about this. I just don't
7 remember.

8 Q. Mr. Fanning, putting aside your understanding of what the
9 month-to-month deferral was, after you received this April 7
10 text message from Mr. Dempsey, did you subsequently learn that
11 AMCK had not agreed to an indefinite month-to-month deferral of
12 rent under the 15 lease agreements with Frontier?

13 A. Sorry, can you repeat that?

14 Q. Sure. After you received this text from Jimmy Dempsey, did
15 you subsequently learn that AMCK had not agreed to an
16 indefinite deferral of rent under the 15 lease agreements with
17 Frontier?

18 A. My recollection is that we did agree to a month-to-month
19 with AMCK.

20 THE COURT: I think in light of the conversation to
21 this point, your insertion of the word "indefinite" really
22 clouds the meaning of the question.

23 MR. ALEXANDER: I understand, your Honor. I'll
24 rephrase.

25 Q. Mr. Fanning, do you have any memory of AMCK and Frontier

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Fanning - Cross

1 actually entering a month-to-month rent deferral agreement?

2 A. So, in the context of what you're asking, we were
3 eventually going to get into a month-to-month agreement. But,
4 part of that was based on AMCK's ask to defer the aircraft for
5 three to six months. We were -- this was going to be part of
6 the bigger agreement based on the conversations that were going
7 on at that time. We were eventually going to sign an agreement
8 on a month-to-month basis. No question about it.

9 But, to the context of when the aircraft were going to
10 deliver, we did not know during that time. But, like every
11 other -- like every other deferment agreement, it was assumed
12 that we would eventually get there with AMCK. We just did not
13 know at that time. Mobile, Alabama was shut down. There was
14 an uncertainty as to when it was going to open. There was
15 still -- Mr. Dempsey was still speaking to Airbus about pushing
16 the aircraft beyond May, based on AMCK's request and to try to
17 get them into July.

18 So, answering your question, eventually we'd get
19 there, yes. That's what we all assumed we would get to in
20 terms of an agreement, there would be an agreement in place.

21 Q. And you expected that agreement to be in writing, correct?

22 A. Yes.

23 Q. And you testified that you expected it to be in writing and
24 you thought eventually you'd get there, but was there ever a
25 written month-to-month deferral agreement?

04A3FRO1

Fanning - Cross

1 A. Well, we couldn't get there because not every week, but
2 multiple times during the six, seven weeks that Mr. Dempsey was
3 making progress with Airbus, my recollection was that AMCK were
4 asking for additional requests. It was hard to know what
5 exactly the requests were going to be as to how -- what would
6 go into the agreement.

7 So, again, eventually we would get there, but until we
8 reached an agreement, I mean, obviously it wasn't going to be
9 signed until an agreement was reached. But more importantly,
10 when Airbus were going to basically put a final these are the
11 delivery dates, these are the final delivery dates and that is
12 all we're going to offer you. That has still not occurred yet
13 because Mr. Dempsey was still in negotiations with Airbus.

14 Q. Did you ever see any e-mail or text message from
15 Mr. Sheridan confirming a month-to-month agreement with
16 Mr. Dempsey?

17 A. Well, why would I have when they had a conversation?

18 Q. Earlier you testified about your phone call with
19 Mr. Sheridan on April 6, after which he sent a confirming
20 e-mail granting a 10-day grace period, right?

21 A. Right. But the difference is that we were eventually going
22 to get to an agreement based on the month-to-month basis, once
23 we had reached an agreement with Airbus based on AMCK's
24 request. We hadn't got there yet, and that was a request made
25 by AMCK. We were negotiating on behalf of AMCK to defer the

04A3FRO1

Fanning - Cross

1 aircraft as far to the right, meaning that it was going to be
2 delayed as much as possible. That was still ongoing with
3 Mr. Dempsey and Airbus.

4 Q. Do you recall ever seeing any e-mail or text message from
5 Mr. Dempsey to Mr. Sheridan confirming a month-to-month
6 agreement?

7 A. No.

8 Q. Mr. Fanning, earlier we looked at some communications you
9 had with Mr. Sashikumar about the 10-day grace period on
10 April 6. Do you recall that?

11 A. Yes.

12 Q. So that was just the day before this April 7 text exchange
13 we've been looking at, right?

14 A. Correct.

15 Q. And on April 6, you sent Mr. Sashikumar an e-mail and you
16 also sent him a text letting him know about the 10-day
17 deferral, right?

18 A. That is correct.

19 Q. And you did that because you testified earlier you wanted
20 him to be aware of the status of deferral discussions with
21 AMCK, right?

22 A. So he was kept up to date, yes.

23 Q. Did you send him any e-mail or text message regarding an
24 April 7 month-to-month deferral agreement?

25 A. So, I communicate two ways, by phone and by text. I was

04A3FRO1

Fanning - Cross

1 obviously communicating. Just because I didn't -- just because
2 I didn't send Sharath a text doesn't mean he wasn't notified.
3 We spoke multiple times daily. And again, part of those
4 conversations would have been that Jimmy -- Mr. Dempsey -- had
5 reached an agreement with Paul Sheridan on a month-to-month
6 basis for three months.

7 Q. Did you send Mr. Sashikumar an e-mail or a text about it?

8 A. I would have made him aware, so I didn't have to send him a
9 text.

10 Q. You said you would have made him aware. Does that mean
11 you're testifying that you did make him aware?

12 A. On my recollection, he would have been aware just like any
13 other lessor that was going on at that time. Did I send him a
14 text? No, I did not send him a text. But he would have been
15 made aware shortly after Mr. Dempsey had sent a text based on
16 the agreement he had agreed with Mr. Sheridan.

17 Q. You said he would have been made aware, but you don't
18 actually remember making him aware, do you?

19 A. If you are asking me for a specific time and date, I do not
20 remember.

21 Q. You testified yesterday, Mr. Fanning, about an April 9
22 draft rent deferral agreement that Jane O'Callaghan sent to
23 you. Do you recall that?

24 A. I do, yes.
25

O4ABFRO2 Fanning - Cross

1 BY MR. BUTLER:

2 Q. I'd like to show that to you. It's Joint Trial exhibit 79.

3 A. Okay.

4 Q. And, Mr. Fanning, this is an April 9, 2020 email from Jane
5 O'Callaghan to you and others at Frontier, right?

6 A. Yes.

7 Q. Do you understand in this email Ms. O'Callaghan was sending
8 a draft rent deferral agreement for Frontier?

9 A. That is correct.

10 Q. And if you look at the subject of the email, it says,
11 forward Frontier, draft deferral in discussion for 14 of the 15
12 delivered aircraft. Do you see that?

13 A. I do.

14 Q. What did you understand that to mean?

15 A. This was for the 14 aircraft. This was the first deferral
16 agreement for the first aircraft out of the 14 aircraft that we
17 had seek a deferral agreement on.

18 Q. Did you understand that AMCK was providing a draft deferral
19 agreement regarding the deferral discussions?

20 A. Well, this would have been the baseline for whatever that
21 agreement. It wasn't final, again, for the reasons I had
22 mentioned. There were ongoing discussions with Airbus. We
23 didn't know the delivery date, but this was a baseline of a
24 draft, the first draft copy of that agreement.

25 Q. Well, why don't we look at the draft agreement attached to

O4ABFRO2 Fanning - Cross

1 this email which starts on the second page of this document.

2 And it's drafted as, from Wells Fargo. Is that because Wells
3 Fargo was the lessor on some of the leases between AMCK and
4 Frontier?

5 A. Owner trustees, yes.

6 Q. Does this look like the sort of agreement Frontier would
7 sign for a rent deferral?

8 A. That is correct.

9 Q. I'd just like to walk through a few of the terms of this
10 draft agreement with you. If we go down to the bottom of this
11 page you'll see section two forbearance, and Section 2.1
12 describes the rent that would be deferred under this draft
13 agreement; is that right?

14 A. That is correct.

15 Q. And at this time AMCK was proposing to defer only the rent
16 for this aircraft that was due in April, right?

17 A. For the ten-day deferral agreement, that is correct.

18 Q. I'm not sure I understood. What did you say about the
19 ten-day deferral agreement, Mr. Fanning?

20 A. This agreement was based on the ten-day deferral agreement
21 that we had. Obviously the following day on April 7th, there
22 was an update. But at that point in time that is what was
23 agreed, that we had a ten-day deferral with AMCK.

24 Q. Well, do you recall that that ten-day deferral that AMCK
25 provided on April 6, lasted ten business days until April 21?

O4ABFRO2

Fanning - Cross

1 A. Yeah, but that changed on April 7th, because of the factory
2 shutting down. Airbus were not going to deliver -- so Airbus
3 were not going to deliver an airplane before -- the second
4 airplane was not going to deliver on April 24th or before that.

5 Q. But AMCK was proposing in this draft only to defer the
6 April rent, right?

7 A. No. They were asking -- so my understanding was that we
8 had an agreement in place that no rent should needed to be paid
9 on the 14 aircraft till the second aircraft got delivered.

10 Q. But apart from your understanding what AMCK was proposing
11 in section 2.1 was to defer only the rent due in April for that
12 aircraft, right?

13 A. Well, by the time this was reviewed, this proposal was
14 outdated. It wasn't relevant to what was going on pretty
15 rapidly because of the developments that Mr. Dempsey had
16 learned about Airbus. So this agreement was not relevant to
17 the current situation at that time.

18 Q. And this agreement was sent to Frontier on April 9, right?

19 A. Right. But it still, like I said, Mr. Dempsey had a
20 conversation with Mr. Sheridan on April 7, and the agreement
21 hadn't caught up with the current developments that were going
22 on.

23 This was used as a baseline. This section 2.1 would
24 have got changed based again on the conversation Mr. Dempsey
25 and Mr. Sheridan had. It just hadn't been updated.

O4ABFRO2

Fanning - Cross

1 Q. Just to confirm, Mr. Dempsey and Mr. Sheridan spoke on
2 April 7th, right?

3 A. Correct.

4 Q. And there was discussion in your text exchange on April 7th
5 about following up with Jane in a draft, right?

6 A. That is correct.

7 Q. And then on April 9th, Jane O'Callaghan sent you a draft
8 rent deferral agreement that covered the month of April, right?

9 A. But in my mind this was already outdated cause it wasn't
10 relevant to what had been discussed. Sure. We were going to
11 use this form. It just didn't reflect the current situation at
12 that time on April 9th, which we already knew -- because as I
13 mentioned, the second aircraft couldn't even deliver on April
14 24th because the Airbus facility was shutdown.

15 There's no delivery happening in April. 2.1 is
16 irrelevant at this point simply because we do not know when the
17 second aircraft is going to deliver. Yes, we will use this
18 draft as a form, but it was not reflected as to when the second
19 aircraft was going to deliver. And at that time of April 9th
20 when it was sent, nobody knew when that aircraft was going to
21 deliver.

22 Q. I understand that you viewed it as irrelevant in light of
23 events, and I think you testified yesterday that this agreement
24 didn't make sense to you. But did you understand that this is
25 what AMCK was proposing on April 9th?

O4ABFRO2

Fanning - Cross

1 A. What do you mean it didn't make sense to me. I don't
2 understand. What's that statement that it doesn't make sense?
3 It does make sense. It's a deferral agreement. It just wasn't
4 updated to where Mr. Dempsey and Mr. Sheridan had agreed on a
5 month to month.

6 Again, in my mind, it's pretty simple. No aircraft is
7 going to deliver on the 24th of April. It's not going to
8 happen. Second aircraft is not going to deliver. Airbus is
9 shut down. Pure and simple. When that aircraft is going to be
10 delivered, not even Airbus knew when that aircraft was going to
11 deliver. This was a deferral form. No question about it. It
12 just wasn't updated during the current events that were going
13 on at this point in time.

14 Q. Was this form ever updated?

15 A. To my recollection, no. Because again, AMCK made multiple
16 request, and we had not come to a final agreement with them.
17 So, no, it had not got updated. To my recollection, it had not
18 got updated. If AMCK updated it, they never sent it on.

19 Q. Let's go to the next page of this document. And at the top
20 do you see in section 2.1.1 AMCK was proposing a six percent
21 interest rate on the deferral on the rent deferred in April?

22 A. That is correct.

23 Q. And so did you understand that if Frontier agreed to this
24 proposal, it would have to pay six percent interest on the
25 deferred rent?

O4ABFRO2

Fanning - Cross

1 A. That is correct.

2 Q. And do you see in section 2.1.2, AMCK was proposing that
3 the deferred April rent would have to be repaid with interest
4 by July 2020, right?

5 A. That's what it says, yes.

6 Q. So that would be a three-month repayment period, right?

7 A. On a month-to-month basis, yes.

8 Q. What do you mean on a month-to-month basis?

9 A. So, again, for a total of three months on a month-to-month
10 basis.

11 Q. Well, in this agreement that we're looking at, AMCK was
12 proposing to defer only the April rent, and that rent would
13 have to be repaid in July, right?

14 A. That is correct.

15 Q. So it was a three-month repayment period for that deferred
16 rent, right?

17 A. So, again, the deferred amount would have been -- would
18 have had to have been paid based on the condition that
19 Ms. O'Callaghan had set out to me was on the next delivery
20 date. But it would have went up to three months if we needed
21 it.

22 Q. Does it say that in this agreement?

23 A. No, but it doesn't -- but, again, this agreement at this
24 point in time is outdated. It's not reflective of what was
25 going on, on April 9th. As I have stated before, this is a

O4ABFRO2

Fanning - Cross

1 point in time it's not current to what's going on with the
2 discussions between Airbus and the discussions between
3 Mr. Dempsey and Mr. Sheridan.

4 Q. Although I think it's pretty clear, and you agree, that
5 this draft proposal was sent two days after the discussion
6 between Mr. Dempsey and Mr. Sheridan on April 7th, right?

7 A. Even if we signed this agreement the way that you're
8 suggesting, we wouldn't have been able to -- I mean, we
9 wouldn't have been able to abide because we wouldn't have been
10 able to deliver the second aircraft.

11 Q. In section 2.2 of this draft agreement it states that it
12 would be effective upon the signing of the acknowledgment to
13 this letter by the lessee and be subject to the terms and
14 conditions set forth in this letter.

15 What did you understand that to mean?

16 A. That once the agreement is signed, what is in the context
17 of the deferral agreement is in enforcement and in effect.

18 Q. And Frontier never signed this letter, did it?

19 A. We couldn't sign it.

20 Q. Why couldn't you sign it?

21 A. Because we were still -- Mr. Dempsey was still negotiating
22 with Airbus on the request that AMCK had made to defer the
23 aircraft three to six months.

24 Q. But if Frontier had signed this letter, there would have
25 been a deferral of the rent due in April, right?

O4ABFRO2

Fanning - Cross

1 MR. HOSENPUD: Excuse me, your Honor, objection.

2 Misstates the record and assumes facts.

3 THE COURT: Strictly speaking it calls for speculation
4 too. Sustained.

5 Q. Mr. Fanning, you testified that this wouldn't work because
6 of the Airbus delivery schedule; is that right?

7 A. For the second aircraft, correct.

8 Q. If Frontier had agreed to a deferral of April rent, would
9 that have provided some deferral relief for Frontier in the
10 month of April?

11 A. If Airbus didn't shut the facility down, we were -- I'll
12 say not forced, but pushed to take delivery. Airbus had told
13 us we needed to take delivery of this airplane, then there's a
14 good chance this would have got signed.

15 Q. If discussions were ongoing with Airbus in May of 2020, you
16 could have agreed on another deferral for the month of May, no?

17 A. No, because AMCK were not agreeing to take the aircraft In
18 may and wanted to push -- wanted the aircraft to be pushed out
19 further than May, based on their original request.

20 Q. But you testified earlier about the month-to-month
21 agreement on April 7th, right?

22 A. For three months, correct.

23 Q. Right. Couldn't have this deferral been done on a
24 month-to-month basis with a new agreement each month?

25 A. It could have been, but it's my understanding that this

O4ABFRO2 Fanning - Cross

1 agreement would have been in force for three months.

2 Q. So it could have been but your understanding based on what
3 Mr. Dempsey texted you on April 7th, was that it was a
4 three-month period, right?

5 A. That is correct.

6 Q. I'd like to show you your text messages with Jane
7 O'Callaghan which are in Joint Trial Exhibit 17. I'd like to
8 direct you to page four of this document.

9 Do you recall looking at this text exchange yesterday
10 on April 1, 2020, between you and Ms. O'Callaghan?

11 A. Yes.

12 Q. And Ms. O'Callaghan says, Hi, Robert, can we talk today?
13 Need to understand how you are getting on with delivery
14 deferrals with Airbus. We haven't had your feedback on draft
15 rent deferral agreement for April.

16 Do you see that?

17 A. That is correct.

18 Q. And you testified yesterday about a gap of about April 6 to
19 April 20th, in communications between you and Ms. O'Callaghan.
20 And I believe you testified it was because Frontier was working
21 with Airbus on requested delays, correct?

22 A. Yes, we needed time with Airbus.

23 Q. But you weren't asked about this message on April 21st, and
24 so I'd like to ask you, did you understand that Ms. O'Callaghan
25 was asking you about feedback on the draft rent deferral

O4ABFRO2 Fanning - Cross

1 agreement she had sent on April 9th?

2 A. As mentioned in some correspondence from AMCK, they were
3 aware that we needed time in order to negotiate deliveries
4 beyond the current delivery date based on AMCK's request. She
5 obviously wanted an update, and she wanted feedback if we --
6 she wanted feedback on the draft deferral agreement. The
7 reason she hadn't heard back because we were still in
8 negotiation with Airbus based on AMCK request.

9 Q. The date of this text message is April 21, do you recall
10 that was the last day of the ten-day grace period that
11 Mr. Sheridan had provided?

12 A. So my recollection was ten days was old news. We were on a
13 month-to-month basis at that point. So the ten days was not in
14 effect. We were going to month-to-month for three months.
15 That was my recollection and my understanding on April 21st.

16 Q. But do you agree that April 21st was the last day of the
17 ten business day period that Mr. Sheridan provided on April 6?

18 A. As far as I was concerned, it was old news. It wasn't
19 relevant. It was not something that had crossed my mind.

20 Q. Do you recall that the date that Mr. Sheridan provided as
21 the end of his ten business day grace period was April 21st?

22 A. Wasn't even in my mind. We were on a month-to-month basis
23 as far as I was concerned. Given the fluid developments that
24 were going on with Airbus, I didn't even think about the ten
25 days. Mr. Dempsey told me we were on a month-to-month, we were

O4ABFRO2 Fanning - Cross

1 on a month to month.

2 Q. Can we put up Joint Trial Exhibit 60.

3 Mr. Fanning, this is Mr. Sheridan's April 6th 2020
4 email which you testified about earlier.

5 Do you recall that?

6 A. Yes.

7 Q. And you testified that you didn't think this was relevant
8 anymore, but just to confirm the date in Mr. Sheridan's April
9 6th email, he was providing a rent deferral until 21 April for
10 the next ten working days, right?

11 A. Based on April 6, that's what we had. That's what we had
12 agreed, yes.

13 Q. That was the day Ms. O'Callaghan reached out to you for
14 feedback on the draft rent deferral agreement for April?

15 A. It's the same date, yes.

16 Q. Let's go back to your text messages with Ms. O'Callaghan.
17 There's reference here to a phone call. Do you remember
18 talking to Ms. O'Callaghan on April 21st?

19 A. Says we had a phone call that day, we had a phone call that
20 day. The context of the conversation, I do not recall.

21 Q. And so you don't remember what, if anything, was discussed
22 on April 21st, do you?

23 A. Well, specifically, no, but I would have had a -- I would
24 have remembered some things we would have talked about based on
25 the information that was given to us at that time. On the

O4ABFRO2

Fanning - Cross

1 progress that we were making with Airbus, I would have given
2 her an update as to where we were with Airbus.

3 Q. You said you would have given her, do you recall giving her
4 any information?

5 A. You ask me to the context. As specific, no, I do not
6 remember.

7 Q. So you don't remember whether there was any discussion
8 about extending a grace period on that call, do you?

9 A. I didn't need to. There was an understanding that we were
10 on a month-to-month. Unless it was something that was brought
11 up by her, I didn't need to have a conversation about it.

12 Q. But whether or not you needed it, you don't recall any
13 discussion about it, correct?

14 A. I don't recall the discussion about it.

15 Q. Let's take a step back, Mr. Fanning. We've been talking
16 about the month-to-month agreement that you testified about. I
17 just wanted to ask more generally, during April 2020, AMCK and
18 Frontier were discussing a potential agreement, correct?

19 A. Yes.

20 Q. And part of that involved Frontier's request for rent
21 deferral, right?

22 A. Correct.

23 Q. And part of that was that AMCK wanted some concessions
24 under the Framework Agreement, right?

25 A. Correct.

O4ABFRO2

Fanning - Cross

1 Q. So AMCK had some asks of its own as part of this
2 negotiation, right?

3 A. That is correct.

4 Q. I'd like to show you Joint Trial exhibit 58. This is an
5 April 3rd, 2020 email from Mr. Sheridan to Mr. Dempsey and
6 others including you. Do you see that?

7 A. Yes.

8 Q. And do you understand that Mr. Sheridan was setting out
9 AMCK's position at this time on a rent deferral and what would
10 be required to reach that agreement?

11 A. That is correct.

12 Q. And Mr. Sheridan said that the deferral would be strictly
13 on the basis that we suspend the SLB for six months.

14 Do you see that?

15 A. Correct, which Mr. Dempsey was discussing with Airbus,
16 correct.

17 Q. Was Frontier able to suspend the SLB for six months?

18 A. No, but that's was our attempt. We were trying to
19 accommodate AMCK's request when Mr. Dempsey was talking to
20 Airbus. He knew and was going to try and get six months for
21 AMCK.

22 Q. So Frontier tried to get a six-month delay, but wasn't able
23 to achieve that; is that correct?

24 A. We made best efforts. And with all our leverage, we tried
25 to get six-month delay based on request by AMCK.

O4ABFRO2

Fanning - Cross

1 Q. And ultimately Frontier and Airbus agreed on some delivery
2 delays, right?

3 A. There was no way that we could accommodate the six months
4 because the second aircraft had already been -- it was probably
5 near ready for delivery. I believe there was a technical issue
6 with the aircraft that would have gotten solved sometime in
7 April.

8 The second aircraft or the third aircraft would have
9 been fairly close behind this, and same with the fourth
10 aircraft. These aircraft were already built, but AMCK made
11 this request that they wanted to suspend delivery for six
12 months. I mean, again, these airplanes were delivered in
13 Mobile, Alabama. There was no way they were going to be able
14 to hold these planes for six months.

15 And based on the view that we had, we needed the
16 aircraft, but this is what AMCK requested. My recollection is
17 that Jimmy was going to try best efforts to accommodate what
18 AMCK was looking for, even though it would have been a
19 financial burden on Frontier.

20 Q. No matter how hard anybody tried, Frontier and Airbus did
21 not agree on a six-month delivery delay, did they?

22 A. We did not, no.

23 Q. I'd like to point you to the language at the bottom of this
24 email from Mr. Sheridan he states, For avoidance of doubt, this
25 email is for discussion purposes only. This email and any

O4ABFRO2

Fanning - Cross

1 subsequent discussions or correspondence we may have with you
2 are not intended to create and do not create any binding
3 obligations on the part of AMCK or any of its affiliates. Do
4 you see that?

5 A. I do.

6 Q. What did you understand that to mean?

7 A. It was not a binding letter.

8 Q. I'd like to go back to your text messages with
9 Ms. O'Callaghan which is Joint Trial Exhibit 17, if we could go
10 to page four of this document.

11 On April 23, 2020, Ms. O'Callaghan informed you about
12 a shareholder unwillingness to fund a new purchase if there are
13 any payments at all outstanding. Do you see that?

14 A. I do.

15 Q. Did you understand in your discussions with Ms. O'Callaghan
16 that she was trying to get the AMCK shareholder on board with
17 an agreement?

18 A. So my recollection would have been, it would have been they
19 did not want any outstanding payments based on whatever the
20 second aircraft was going to occur. They did not want any
21 outstanding payments for the 14 aircraft. It had to be paid
22 prior to the second delivery.

23 Q. But did you understand in your discussions with
24 Ms. O'Callaghan that she was talking to AMCK shareholder on the
25 back-end, right?

O4ABFRO2 Fanning - Cross

1 A. That's my understanding, yes.

2 Q. And did you understand that she was trying to get their
3 approval or buy-in for an agreement, right?

4 A. That's what she stated in her text, yes.

5 Q. Let's look at page five of this document. Do you see on
6 April 25th, 2020, Ms. O'Callaghan wrote you, Hi, Robert. We
7 can chat later today. We struggled at our board meeting last
8 week. Here are the basic elements of our board and
9 shareholder's direction on how to approach the remaining
10 A320neo sale and leasebacks this year. Do you see that?

11 A. I do.

12 Q. And there's two numbered points there. The first one is
13 that no deferred payments could be outstanding at closing. And
14 you understood that?

15 A. Yes.

16 Q. And the second point Ms. O'Callaghan states is, We need
17 some quid pro quo to fund \$250 million of capex on terms that
18 now appear to be wildly off market. Do you see that?

19 A. I do.

20 Q. And Ms. O'Callaghan goes on to propose what she calls a
21 quid pro quo or QPQ here. Do you see that?

22 A. That is correct.

23 Q. And what was the QPQ that she was proposing in this text?

24 A. So we didn't know at the time what the QPQ was going to be,
25 but obviously it was a request to extend the 14 aircraft that

O4ABFRO2 Fanning - Cross

1 had eight year leases to extend by another four years.

2 Q. You testified yesterday that AMCK was making request to
3 Frontier that none of Frontier's other lessors were doing; is
4 that right?

5 A. So in the context of the majority of the lessors, that is
6 correct. But there were lessors that were current lessors with
7 Frontier that did make requests similar to wanting to extend
8 aircraft.

9 Q. Was AMCK Frontier's only lessor signed up to take delivery
10 of aircraft in March of 2020?

11 A. March 2020, that was the first aircraft from what I
12 remember, yes.

13 Q. And AMCK made a request like this, and you testified that
14 there was some other lessors, not the majority, but some other
15 lessors who made request like this, right?

16 A. To my recollection there may have been one or two. There
17 wasn't many that made this type of request.

18 Q. And you understood that AMCK was proposing these quid pro
19 quos as part of any overarching agreement on the sale and
20 leaseback agreement and rent deferral, right?

21 A. At this point, there had been multiple -- my recollection
22 and the way I saw it was, every time Mr. Dempsey was making
23 progress with Airbus, AMCK came back with another ask, another
24 ask, another ask. Every time we hear back from them, they
25 wanted something else.

O4ABFRO2

Fanning - Cross

1 Q. And in the text message exchange below this, you respond
2 and say, Well, that's a huge ask over 12 additional aircraft.
3 Do you see that?

4 A. Yes.

5 Q. And you go onto say, that's only that you're asking
6 Frontier to pay 100 percent of the deferred rent, which is a
7 huge amount of money for an airline that's not making much.

8 Do you see that?

9 A. I do.

10 Q. Was that true?

11 A. I'm not in the accounting or treasury department that
12 manages cash, but my understanding Frontier Airlines was making
13 very, very little money on a day-to-day basis.

14 Q. I'd like to show you Joint Trial Exhibit 120. I believe
15 that you testified about this document yesterday, Mr. Fanning,
16 but it's an April 30th, 2020, email from Paul Sheridan to Jimmy
17 Dempsey and others including you.

18 Do you see that?

19 A. I do.

20 Q. Does this email from Mr. Sheridan set forth AMCK's
21 conditions at that time for funding upcoming deliveries under
22 the Framework Agreement?

23 A. This was their revised -- another ask based on the multiple
24 asks they had asked, but that is correct.

25 Q. And did you understand at this time that AMCK might

O4ABFRO2

Fanning - Cross

1 terminate the Framework Agreement if these conditions were not
2 met?

3 A. As I stated yesterday, we had a very, very strong close
4 relationship with Mr. Sheridan and Ms. O'Callaghan. At this
5 point in time, I wasn't concerned that they were going to put
6 us in default.

7 Q. So I understand you testified yesterday you were surprised
8 or shocked that the Framework Agreement was terminated, right?

9 A. That is correct. The way relationship work with lessors,
10 there's always the black and white. There's always the
11 agreements, but you're always going to run into disagreements
12 and you're always going to work into scenarios where you need
13 to work together. AMCK was no different. They were going to
14 become potentially our largest lessor, and we wanted to work
15 with them, just like they wanted to work with us.

16 I was under no impression -- and I believe Mr. Dempsey
17 had the same view to a certain extent -- obviously we needed to
18 plan in the event that they weren't going to show up. But I
19 didn't believe, my own personal opinion, I didn't believe they
20 were going to put us in default.

21 Q. You didn't believe they were going to, but you thought it
22 was certainly a possibility, right?

23 A. That's putting words in my mouth. I just stated I did not
24 believe in any way, shape or form over the eight weeks that
25 they were going to put us in default. No way.

O4ABFRO2

Fanning - Cross

1 Q. Do you recall answering that question a little differently
2 in your deposition, Mr. Fanning?

3 A. Well, I may have, but it doesn't change my position. I
4 wasn't aware that they were going to -- I had no recollection
5 or in terms of my view based on the deposition or during that
6 time that they were going to put us in default. There wasn't
7 even a discussion between myself, Sharath or Spencer.

8 I don't remember in any way, shape or form that I was
9 concerned that they were going to put us in default. My own
10 view today is that if they were going to put us in default, I
11 would have got a notice, or Mr. Sheridan would have reached out
12 to Jimmy to let him know what was going on. We were blindsided
13 with the default notice. We had no idea. And based on this
14 letter, this email, that opinion hadn't changed.

15 Q. You said that you weren't concerned about it, but you did
16 recognize it was a possibility, right?

17 A. Anything is a possibility in life. But at this point in
18 time, I wasn't aware that they were going to put us in default.
19 Mr. Dempsey was still trying to get what Airbus were offering
20 based on the AMCK request. And the view would have been
21 that -- my view would have been on a month-to-month basis based
22 on the text that I sent to Jane on the 25th and the 28th that,
23 hey, we don't want to be in default.

24 She never responded. She never responded, hey, Robert
25 you need to make a payment. I didn't think anything of it,

O4ABFRO2

Fanning - Cross

1 which further supports that I wasn't concerned that they were
2 going to put us in default. I even ask Jane, Ms. O'Callaghan,
3 if they wanted us to make a payment. She never answered my
4 question. I believe I asked three times, two times within the
5 25 and the 28th in text. Hey, the current thing with this, we
6 don't want to be behind. We gonna pay. She never responded.

7 Q. Mr. Sheridan, I'd like to show you --

8 A. Mr. Fanning.

9 Q. I'm sorry. Mr. Fanning. I would like to show you a portion
10 of your deposition in this matter which is marked as Joint
11 Trial Exhibit 178, and I'd like to put up on screen page 105 of
12 that deposition.

13 You were asked: Did you understand at this time that
14 AMCK might terminate the Framework Agreement if these
15 conditions were not met? There's an objection and an answer.

16 Based on the discussions I had with Jane, it was
17 certainly a possibility, yes.

18 Were you asked that question, and did you give that
19 answer?

20 A. As I just stated, anything is a possibility. It doesn't
21 mean it's going to happen. But I mean, yeah, they could have
22 put us in default. They potentially could have put us in
23 default.

24 The way that the question was asked, that's how I
25 answered. As I just stated, anything is a possibility. But if

O4ABFRO2

Fanning - Cross

1 you're asking me my own personal opinion, I did not feel that
2 they were going to put us in default.

3 Q. Let's go back to Joint Trial exhibit 120 which is
4 Mr. Sheridan's April 30th email and walk through some of these
5 conditions that AMCK was proposing at this point.

6 The first bullet there refers to deliveries of
7 aircraft in July of 2020 and February of 2021.

8 Do you see that?

9 A. Yes, I do.

10 Q. And that was referring to a delay in aircraft delivery
11 schedule, right?

12 A. That is correct.

13 Q. And although this was the best Frontier had done, this was
14 not the original six month ask for Mr. Sheridan, right?

15 A. Well, I would slightly disagree with that. We had made
16 great strides, Mr. Dempsey had made great strides with Airbus.
17 So the original request made by AMCK was three to six months,
18 so April, May, June, July. There's three months for three
19 aircraft.

20 And then we were able to, Mr. Dempsey, was able to
21 push two of the remaining five aircraft into 2021. Given the
22 circumstances and the pressure that we were under, I would say
23 we came fairly close to the original request that was made by
24 AMCK. Again, the goalpost shifted so many times. But in my
25 way, you can only go back to the well so many times.

O4ABFRO2

Fanning - Cross

1 What I mean by that is, is that based on the first
2 request made by AMCK to Frontier, Jimmy started discussing,
3 hey, can we push these airplanes to May, June, or July. There
4 would have been an ongoing discussion of what Airbus could
5 accommodate. Again, remembering the first three aircraft were
6 pretty much built. They were painted. They were going to be
7 delivered to Mobile, Alabama. There wasn't going to be more
8 storage, and Airbus were pressuring us to take the airplanes
9 once the facility had opened.

10 I think we came fairly close and made best efforts on
11 the original request made by AMCK. Ultimately we came to an
12 agreement that three aircraft would deliver in July, and the
13 remaining two would be sometime in Q1 of 2021.

14 Q. So Mr. Sheridan in his April 3rd email that we looked at
15 before had asked for a six-month delay. Frontier was able to
16 through its best efforts get the delivery schedule listed here,
17 and now Mr. Sheridan was including that as one of the
18 conditions for their proposal in this email, right?

19 A. Their new conditions, yes.

20 Q. And let's look at some of the other conditions.

21 The second bullet point I believe you testified about
22 yesterday, but that involved being current on rent as of May
23 15, 2020, right?

24 A. Yeah, and this condition was a surprise because AMCK had
25 maintained that we needed to be current on all payments up to

O4ABFRO2

Fanning - Cross

1 whenever the second aircraft was going to deliver, and this was
2 a new request made by AMCK.

3 Q. And the third bullet includes another condition regarding
4 lease extensions of four years on certain of the aircraft. Do
5 you see that?

6 A. That is correct.

7 Q. And what did you understand Mr. Sheridan was proposing in
8 this bullet?

9 A. On the 12 aircraft that we had from AMCK, they were
10 extended -- their request was that we extend them for four more
11 years based on the current eight-year deal lease, agreement
12 deal we had in place. They wanted to extend these airplanes out
13 for 12 years total.

14 Q. And the bullet also says, These extension will only apply
15 if there are any payment related defaults out to 15 May 2021,
16 right?

17 A. That is correct.

18 Q. So this lease extension Mr. Sheridan was talking about
19 would only come into play if Frontier failed to make rent
20 payments prior to May 15, 2021, right?

21 A. That is correct.

22 Q. Was Frontier concerned about not being able to make rent
23 payments?

24 A. We were never concerned. If AMCK at any point in time of
25 the discussions, if Ms. O'Callaghan or Mr. Sheridan came to

O4ABFRO2

Fanning - Cross

1 Mr. Dempsey or myself and told us that we needed to make
2 payments, we would have made payments.

3 I asked Jane again on the 25th and 28th, our thinking
4 is, we'll make payments. She never said, yeah, go ahead. I
5 think it's good. She never stated that we needed to make the
6 payments. And our position was, we didn't need to make the
7 payments because we were on the three month extension on a
8 month-to-month basis. I would assume that Ms. O'Callaghan
9 would have reached out and said, hey, Robert, you need to make
10 the payment.

11 We heard this request from like I said two of our
12 other lessors. I assume that they wanted us to make the
13 payment, we would have made the payment. We did not want to
14 be -- as much as I can recall to the best of my knowledge, we
15 did not want to be in any type of situation or default
16 situation with AMCK. And our belief was up to this point that
17 we would have to be current on all 14 aircraft in order for
18 them to fund the remaining aircraft so we would not be put in a
19 default situation.

20 Then oddly Mr. Sheridan sent this email on April 30th,
21 and again the goalpost had changed that they wanted to be made
22 on May 15th.

23 Q. I'd like to direct your attention to the last line of this
24 email, Mr. Fanning, in which Mr. Sheridan says, For the
25 avoidance of doubt, this email is for discussion purposes only.

O4ABFRO2

Fanning - Redirect

1 This email and any subsequent discussions or correspondence we
2 may have with you are not intended to create and do not create
3 any binding obligations on the part of AMCK or any of its
4 affiliates. Do you see that?

5 A. I do.

6 Q. Mr. Fanning, did Frontier agree to all of the conditions in
7 this email?

8 A. No.

9 MR. BUTLER: Thank you, Mr. Fanning. I have no
10 further questions.

11 THE WITNESS: Thank you.

12 REDIRECT EXAMINATION

13 BY MR. HOSENPUD:

14 Q. Good morning, Mr. Fanning. I'd like to reread the question
15 and answer in your deposition that was read to you on cross and
16 I'm at page 105.

17 And the question reads: And did you understand at this
18 time, referring to April 30, that AMCK might terminate the
19 Framework Agreement if these conditions were not met?

20 And the answer is: Based on the discussions I had with
21 Jane, it was certainly a possibility, yes.

22 Did you understand that question to be asking whether
23 AMCK would put Frontier in default or terminate the Framework
24 Agreement and not show up?

25 A. The way the question was asked to me, I assumed it was

O4ABFRO2

Fanning - Redirect

1 based on were they going to put us in default and if they put
2 us in default. Again, my recollection is that in my mind that
3 they could certainly try and put us in default. But was I
4 fearful, was I kind of worried that they were going to put us
5 in default, the answer was no.

6 It was certainly a possibility. My way of looking at
7 possibilities, like anything is possible. I mean it's
8 certainly an option. But is that what I felt at the time, no.
9 I would have queried Ms. O'Callaghan if I really felt they
10 would have put us in a default situation.

11 Q. Despite having the desire to conserve capital, did Frontier
12 pay any lessor who said simply at the very beginning of these
13 discussions, no, I'm not going to give you a rent deferral?

14 A. There were maybe two or three lessors that were borderline
15 that were considering us. They were looking at our cash
16 position relative to other airlines, but they had not said no
17 at that point in time. They needed more information to make
18 that determination.

19 Q. Did any lessor who ultimately made the determination and
20 said no, what did Frontier do?

21 A. We paid the rent when it was due.

22 Q. You were asked questions about other lessors setting up
23 conditions. Did any lessor -- strike that.

24 Were there lessors who had deliveries in 2020 other
25 than AMCK?

O4ABFRO2

Fanning - Redirect

1 A. Yes, there was.

2 Q. Did that lessor ever make a condition to defer aircraft
3 delivery?

4 A. To my recollection, no.

5 Q. Now let's go back if you wouldn't mind to the April 3, 2020
6 email from Mr. Sheridan to Mr. Dempsey, and I believe that is
7 Exhibit 58. This is the April 3 communication from Mr. Dempsey
8 setting up the six month SLB delivery deferral for the
9 remaining aircraft. You see that?

10 A. Yes.

11 Q. And then he goes onto say, this deferral is to have a
12 repayment period over the subsequent four months once the three
13 months are done, right?

14 A. Yes.

15 Q. And did this change after April 3, 2020, to tying the
16 repayment of rents to the delivery of the first aircraft?

17 A. The second aircraft.

18 Q. The second aircraft. Thank you.

19 Once that condition was put in place, did that remain
20 a constant timing condition that AMCK proposed in each of its
21 subsequent communications to Frontier?

22 A. As far as I recall, there was never a conversation other
23 than in the month of April that the deferral payments were
24 linked to -- the payment of the deferral payments were linked
25 to the second aircraft.

04ABFRO2

Fanning - Redirect

1 There was never a conversation about the April 30
2 email letter that we got from AMCK for them to now seek payment
3 on May 15th.

4 Q. So May 15 was the first date specified by AMCK for
5 repayment?

6 A. That is correct.

7 Q. Now, Exhibit 60 is the April 6, 2020, email where
8 Mr. Sheridan is confirming for Jimmy Dempsey what had been
9 discussed on the phone with you, correct?

10 A. Correct.

11 Q. And the fundamental message for that ten-day grace period
12 is noted as follows: Mindful of the time it might take you to
13 reach agreement with Airbus, or to make other arrangements,
14 therefore of the ability for us to reach a deferral agreement,
15 we can confirm we won't take any actions or call any defaults
16 linked to the nonpayment of rents on any aircraft where the
17 rent is due from today 21 April, i.e. for the next ten working
18 days.

19 What I'd like to focus on is the notion that needs
20 time to reach any agreement with Airbus. Did you understand
21 this email that way?

22 MR. BUTLER: Objection, leading.

23 THE COURT: The statement of the affairs is a little
24 slanting. It does not suggest a particular answer. I don't
25 think it's leading. Overruled.

O4ABFRO2

Fanning - Redirect

1 Q. Mr. Fanning, did you understand that Mr. Sheridan was
2 recognizing it would take time to reach any sort of agreement
3 with Airbus in this email?

4 A. So Mr. Sheridan has been in the leasing business for a long
5 time. He would have been aware knowing the complicated
6 discussions that were going on, not just with our airline, but
7 with many airlines around the world that had deliveries with
8 Airbus. He would have been aware given that he was in the
9 business, he would have been aware that it was going to take
10 Frontier time to come to a meaningful resolution and agreement
11 based on the ask of AMCK.

12 Q. And co-existing with that, there's a statement, Therefore
13 of the ability with us to reach a deferral agreement.

14 Do you see that reference?

15 A. I do.

16 Q. And so the time with Airbus and reaching agreement is
17 connected to AMCK reaching some sort of final deferral
18 agreement. Did you understand it that way?

19 A. My understanding is that once we came to an agreement with
20 Airbus that would have been documented, and at that point an
21 agreement would have been in force.

22 Q. And the month-to-month agreement that you have been
23 testifying about, which the evidence in the record shows
24 occurred the very next day, did you consider that to be under
25 this structure where the rents would be deferred to allow that

O4ABFRO2

Fanning - Redirect

1 conversation to go forward with Airbus?

2 A. The way I would have viewed this was the -- how can I say
3 this? The way I would have viewed this, that other than the
4 ten day, the month-to-month, because nothing had changed with
5 Airbus other than the discussions that were going on between
6 Airbus and Mr. Dempsey. They were ongoing.

7 The way I would have viewed the way you're asking me
8 is that Paul Sheridan's mindset would have been that this would
9 have been an extension, not for the ten-day, but for the
10 month-to-month for up to three months. Knowing that and
11 Ms. O'Callaghan had asked me at some point in the conversations
12 on whether we could find or whether I could find another lessor
13 to take delivery of the second aircraft. They would have been
14 aware that these things wouldn't have happened overnight and
15 would have needed sometime in order to make the arrangements
16 that they put in to try and get a lessor to take delivery. And
17 also Mr. Dempsey with Airbus to have the conversation to try
18 and come to an arrangement that would have been acceptable for
19 AMCK.

20 Q. So there was a two prong approach?

21 Was there a two prong approach from Frontier Airlines
22 Airbus and potentially other lessors?

23 A. I was responsible for speaking to the other lessors.

24 Mr. Dempsey was responsible for talking to Airbus.

25 Q. And either of those eventualities, would they take time?

O4ABFRO2

Fanning - Redirect

1 A. Given the situation at the time where the world was, it was
2 going to take time.

3 Q. Now you were asked about draft agreements that had been
4 circulated between Frontier to AMCK and AMCK back to Frontier,
5 had the condition of being current before the first aircraft
6 delivery even come into existence when the preliminary
7 agreements were circulated in March, the draft rent deferral
8 agreements?

9 A. I'm sorry. What is your question?

10 Q. Had AMCK even mentioned in March 2020, that Frontier needed
11 to be current before the first delivery? Was that even a
12 subject?

13 A. My recollection was no.

14 Q. And anything discussed before April 6, 2020, was AMCK's
15 condition of Frontier being current before the next delivery
16 even a subject?

17 A. Correct.

18 Q. It was or was not?

19 A. It was.

20 Q. So that started sometime when, in April?

21 A. It would have been the early part of April.

22 Q. Was that coming through communications by phone?

23 A. It could have.

24 Q. Could you bring up Exhibit 85, please.

25 I've got before you, sir, Exhibit 85, and we'll

O4ABFRO2

Fanning - Redirect

1 identify it with just the sticker and then go back up, please.

2 Now this appears to be April 13 email from Paul
3 Sheridan to Jimmy Dempsey, and he is commenting on an earlier
4 email Mr. Dempsey sent to him, if we scroll down just a little
5 bit, where Mr. Dempsey is giving a progress update on April 13.

6 And Mr. Dempsey in this exhibit indicates that Airbus
7 is willing to move aircraft approximately two months in the
8 short-term. The first aircraft would deliver in June and the
9 next two in July.

10 Do you see that reference?

11 A. Yes.

12 Q. And then he indicates he's keen to wrap it up, and that he
13 understands that Mr. Sheridan had been looking for six months,
14 but it's impractical given the advance nature of the aircraft
15 production. Do you see that reference?

16 A. I do.

17 Q. If we scroll up to the top of this exhibit of April 13.
18 Mr. Sheridan is apologizing for his slow response, but was
19 waiting for shareholder feedback.

20 Do you see that reference?

21 A. I do.

22 Q. Then he says, essentially we want to tie the deliveries to
23 having no outstanding deferrals, so it would only work if we
24 recast the deferral agreement. And I'll represent to you that
25 I think Mr. Sheridan testified in deposition that that meant

O4ABFRO2

Fanning - Redirect

1 the rent deferral agreement.

2 And then he goes onto say, the six-month period was to
3 allow for repayments of the deferred rent, as well as to be
4 over the deferral period. Is this concept where he's saying,
5 we wanted the deferred rent payment to be over and not existing
6 at the time of the first delivery?

7 THE COURT: Mr. Hosenpud, I'm interrupting you for two
8 reasons. One is technical and the other is personal. The
9 technical one is, this is not only leading, it's making a
10 speech and then you're going to ask him if he would agree with
11 that.

12 MR. HOSENPUD: I will revise.

13 THE COURT: That is not proper redirect. The personal
14 one is, I have a commitment to be in another part of this
15 building at 1:00, and we're already a little past that. And
16 interesting though this is moment to moment, I've got to
17 conclude it, and we'll resume at 2:15.

18 MR. HOSENPUD: Thank you, your Honor. Understood.

19 THE COURT: My apologies of breaking the thread of
20 this interesting point.

21 (Recess)

04A3FRO3

Fanning - Redirect

AFTERNOON SESSION

2:15 p.m.

BY MR. HOSENPUD:

Q. Good afternoon, Mr. Fanning, just a few follow ups.

Were you ever requested by Jane O'Callaghan or anybody at AMCK to pay rent on April 21, 2020?

A. No.

Q. Were you ever requested at the end of April by anybody at AMCK to pay rent?

A. No.

Q. We're going to look at Exhibit 17. And directing your attention, sir, to the date April 29, 2020, or 29 April 2020, page 6 of this exhibit.

Looking at that first text, it reads, "Hi Jane, just following up from our previous conversations. Before our first delivery we would repay the full rent amounts for the current 14 aircraft."

Why were you stating that?

A. We didn't want to be in default, and it was a requirement for AMCK to take the next delivery, the thought process was that we pay the full rent for the 14 aircraft.

Q. Let's move on to the next page, page 7.

I'm focusing your attention on what is shown as option 2 where it says, "The current rent deferral would stay in place."

04A3FRO3

Fanning - Redirect

1 What did you mean by that statement?

2 A. What I meant by that statement was that the month-to-month
3 that was agreed by Mr. Dempsey and Mr. Sheridan, the rent
4 deferral would stay -- would stay in place, basically the
5 agreement that Mr. Sheridan and Mr. Dempsey had agreed upon, on
6 April 7.

7 Q. And you have other conditions identified there as well,
8 correct?

9 A. That is correct.

10 Q. And those would be that for each of the three aircraft
11 delivering, we would pay six months of rent in advance of each
12 delivery. Did I read that correctly?

13 A. Yes.

14 Q. Moving on, were you asked by Jane O'Callaghan or anybody at
15 AMCK to pay rent May 8, 2020?

16 A. No.

17 Q. Did you believe that Frontier was in default on May 8,
18 2020, when it received the termination notice?

19 A. No.

20 MR. HOSENPUD: Thank you, sir. Nothing further.

21 MR. ALEXANDER: Nothing from the defendants, your
22 Honor.

23 THE COURT: Thank you, Mr. Fanning. You are excused.

24 THE WITNESS: Thank you.

25 (Witness excused)

O4A3FRO3

1 MR. HOSENPUD: Your Honor, our next witness will be
2 Dr. Kevin Neels, and I want to just alert the Court that by
3 agreement between the parties, to accommodate the defendant's
4 expert, we agreed that defendant's expert would follow the
5 testimony of Dr. Neels, our expert, in this period of time,
6 today and tomorrow. Just for efficiencies due to defendant's
7 expert being unavailable the following week.

8 THE COURT: That's fine.

9 MR. HOSENPUD: Thank you, sir.

10 MR. BUTLER: Your Honor, I'd just like to raise to
11 address another housekeeping issue with respect to Dr. Neels,
12 the damages expert for the plaintiff.

13 We raised this in our trial brief. We have a Daubert
14 objection, a rule, Federal Rule of Evidence 702 objection to
15 the admission of his opinions.

16 Of course, this being a bench trial, there are a lot
17 of ways in which this could be addressed, but I did want to
18 rise before Dr. Neels takes the stand to move to exclude
19 Dr. Neels, based on the principles of Rule 702 and Daubert.
20 I'm happy to make some argument on that point, we could reserve
21 it for later, whatever the Court would prefer.

22 THE COURT: Well, I've read your submissions on that
23 as part of your briefs, and I don't see any chance of a Daubert
24 motion succeeding. There are various arguments that could be
25 made pro and con to Dr. Neels' product, but I think it's a real

O4A3FRO3

Neels - Direct

1 enough issue that it should be hammered out in court. And we
2 can start that process.

3 MR. BUTLER: Thank you, your Honor.

4 THE COURT: But the Daubert motion is denied.

5 MR. BUTLER: Thank you, your Honor.

6 THE COURT: Thanks.

7 JOHN KEVIN NEELS,

8 called as a witness by the Plaintiff,

9 having been duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. HOSENPUD:

12 Q. Good afternoon, Dr. Neels.

13 A. Good afternoon.

14 Q. Dr. Neels, did my office retain you to analyze Frontier
15 Airlines' damages in this case?

16 A. It did.

17 Q. Could you briefly outline for the Court your employment
18 history, qualifications, and higher education. Starting first
19 with your employment history.

20 A. I was, right out of graduate school, I was employed in the
21 transportation practice of the firm now known as KPMG.

22 Subsequently I worked in the transportation practice at the
23 Urban Institute, a policy research firm, and at the RAND

24 Corporation, another policy research firm. Subsequent to that
25 I worked in a number of economic consulting firms. I was the

O4A3FRO3

Neels - Direct

1 practice leader for the transportation practice at the firm of
2 Charles River Associates. I was also the transportation
3 practice leader at the Brattle Group. When I stopped being
4 employed at the Brattle Group -- I'm self employed at this
5 point, although I still do work with Brattle.

6 Q. Could you move the microphone slightly closer to you, just
7 the whole microphone. Thank you.

8 A. Thank you. And in answer to the other part of your
9 question, I have a bachelor's degree and a PhD both from
10 Cornell University.

11 Q. And in terms of your consulting work, have you been
12 qualified as an expert in various courts, arbitration settings?

13 A. I have. I've offered expert testimony on a number of
14 different occasions. I think the total number would be in the
15 range of 70 or 80 probably. The testimony I've given has been
16 in federal court, in state court, in arbitrations,
17 domestically, international arbitrations and before regulatory
18 bodies. I've testified before legislative bodies on a couple
19 of occasions.

20 Q. Could you please describe to the Court the scope of your
21 engagement in this matter.

22 A. Well, as you indicated earlier, I was engaged to calculate
23 the injuries suffered by Frontier as a result of the
24 termination of the Framework Agreement by AMCK, and the amount
25 of damages that would have to be paid to Frontier in order to

O4A3FRO3

Neels - Direct

1 make it whole.

2 Q. Did you reach an opinion based on reasonable certainty
3 regarding the amount of damages incurred by Frontier Airlines
4 in this case?

5 A. I did.

6 Q. Based on your most recent calculations, what is your
7 opinion, what is in your opinion the current amount of those
8 damages?

9 A. I think my current opinion, based on the most recent
10 calculations, is that those damages amount to \$49 million,
11 \$49,660,000.

12 Q. Is that for as of April 8, 2024?

13 A. It is.

14 Q. Was that 48,660,000 or 49?

15 A. It was 49, excuse me. Yes. 49. I misspoke, I apologize.

16 Q. In the event that the Court determines that a -- and what
17 is that based on? What type of discount rate and type of
18 discount methodology is that based on?

19 A. That is based upon a discount rate which is derived from
20 Frontier's cost of debt at the time of the injury.

21 Q. Did you do an alternative calculation of the amount of
22 damages, were the Court to choose to base the discount rate on
23 a weighted average cost of capital analysis?

24 A. I did.

25 Q. What was that?

04A3FRO3

Neels - Direct

1 A. In that case the damages would come to \$48,906,000.

2 Q. Would you please summarize for the Court the methodology
3 you undertook to calculate those damages.

4 A. The methodology I employed is what's called the but-for
5 methodology. This methodology is laid out in the handbook on
6 scientific evidence. The reference book on scientific
7 evidence. It basically involves a contrast between the actual
8 situation of the injured party, given the injury, and what the
9 economic status of that party would have been in the instance
10 that the injury had never occurred.

11 So one can observe what the actual status is based
12 upon what we see in front of us. The alternative scenario has
13 to be reconstructed using economic reasoning and principles.
14 That alternative scenario is sometimes called the world as it
15 would have been but for the injury, or, in shorthand, the
16 but-for world.

17 Q. Understood. And for the damages that you calculated, have
18 those damages all been incurred as we sit here today in court?

19 A. Not as of this date. The damages are based upon the
20 differences in leasing terms, the difference between the leases
21 that Frontier would have entered into under the Framework
22 Agreement, and the leases that it actually entered into, you
23 know, and the stream of payments associated with those leases.
24 Some occur prior to this date, some will occur in the future.

25 Q. And what steps did you specifically use to calculate the

O4A3FRO3

Neels - Direct

1 current value of Frontier Airlines' damages?

2 A. Well, first of all, in the case of the actual leases
3 entered into by Frontier, those are, you know, you know, the
4 terms of those leases are actually available, and one can look
5 at the provisions of the leases and calculate what the lease
6 payments are.

7 One can also look at the amounts that Frontier is
8 actually paying. The lease payments are constant over the term
9 of the lease, so we know what those payments are going to be.

10 In the case of the but-for world, there are formulas
11 contained in the Framework Agreement which specify what the
12 amounts of the leases, lease payments would have been under the
13 leases that were provided for by the Framework Agreement. So
14 one can look at those formulas and calculate in the alternative
15 what the lease payments Frontier would have incurred would have
16 been.

17 Q. And was there another step to your analysis in determining
18 the damages that were suffered by Frontier?

19 A. Yes, because the lease payments extend over a multiyear
20 period, you know, they occur at different points in time. And
21 in order to express the damages in terms of what they amounted
22 to at the time of the injury, one needs to discount that stream
23 of payments back to the point of injury.

24 Q. And you mentioned that you have two analyses for discount
25 rates. Let's stay with the one that you used. How did you

O4A3FRO3

Neels - Direct

1 determine which one to use?

2 A. Well, if you look at the nature of the -- well, let me
3 start first by saying as a general rule, if you're discounting
4 a stream of payments, the discount rate that you use should
5 reflect the riskiness of those payments.

6 So one needs to look at the nature of the payments in
7 order to make judgments about that risk.

8 Now, to set up a contrast, if you were looking at the
9 future sort of annual income of Frontier, that could vary
10 because of a wide range of different factors. But that same
11 variation is not true of the lease payments. Both the actual
12 leases and the alternative leases it would have taken effect
13 under the Framework Agreement, both specified in great detail
14 what the payment streams would be into the future. So those
15 payments are not subject to a great deal of risk and
16 uncertainty. They're much more like debt payments than
17 payments to an investment in a business or the equity in a
18 business.

19 So I judged that the best -- the most appropriate
20 discount rate, given the characteristics of that stream of
21 payments, would have been a debt base discount rate.

22 Q. And you mentioned that the payments were not subject to
23 other influencers in the marketplace. What would those types
24 of influencers be?

25 A. Well, for example, if you think about what might affect the

O4A3FRO3

Neels - Direct

1 bottom line income of Frontier, could be changes in market
2 conditions, changes in fuel prices, changes in the structure of
3 the market or the degree of competition Frontier is facing.
4 These are all things that can happen to and do happen to
5 airlines in the normal course of their business. None of that
6 would have had any effect on the payment obligations that
7 Frontier now faces or that it would have faced had the
8 Framework Agreement remained in effect.

9 Q. How did you measure Frontier's aftertax cost of debt as of
10 the date of the alleged injury?

11 A. Well, I initially, my assessment of the cost of debt was
12 based upon an examination of debt agreements entered into by
13 Frontier as reported in their financial statements.

14 There was a particular debt agreement that was entered
15 into late in 2020, that it was a secured debt agreement in that
16 it was backed by Frontier's credit card receivables, it had a
17 specific interest rate at the time it was entered into, and I
18 used that interest rate as my discount rate.

19 Subsequently I found an alternative source that I
20 thought to be more reliable, and in a supplemental report I
21 recalculated damages based on that alternative debt rate.

22 Q. What was that other source that you relied upon?

23 A. That was based upon a cost of debt reported by Bloomberg.
24 Bloomberg is a financial information service that's widely used
25 and well respected in the industry.

O4A3FRO3

Neels - Direct

1 They publish routinely figures for the cost of capital
2 for publicly traded companies, and they will report separately
3 the cost of equity and the cost of debt. The alternative
4 measure that I used was based upon the cost of debt as reported
5 by Bloomberg.

6 Q. And so, what is changed between your original opinion and
7 the supplemental opinion?

8 A. Well, Frontier's history was that it was a publicly traded
9 company, that it went private for a time, and then later it
10 went public again.

11 So initially, when I went to look for discount rates,
12 I looked into Bloomberg for the cost of capital and I looked
13 using the stock ticker that was associated with its original
14 public incarnation.

15 During my deposition, I was asked whether, you know,
16 which particular stock ticker I had searched for, and I became
17 aware then that there was a separate listing for the subsequent
18 public company. Once I was aware of that, I looked into it,
19 and found that Bloomberg had in fact published both cost of
20 capital estimates and cost of debt estimates for the period I
21 was interested in. So I revised my calculations based on that
22 alternative source.

23 Q. Going back to the first analysis based on this loan. What
24 was the percentage that you applied to the debt and then
25 subsequently adjusted?

O4A3FRO3

Neels - Direct

1 A. If I remember correctly, the aftertax discount rate was
2 2.2 percent. And I think the figure that was reported by
3 Bloomberg on an aftertax basis was 1.1 percent. To the best of
4 my recollection, as I sit here without my report in front of
5 me.

6 Q. Do you have your report here?

7 A. Not directly in front of me.

8 Q. Is it here in the courtroom?

9 A. I don't have a copy myself. Someone on your staff may.

10 Q. We'll move on.

11 A. Okay.

12 Q. You mentioned you considered other discount rates. And is
13 this the rate that you used to support a second damage
14 calculation?

15 A. Yes. My second -- my alternative and second choice
16 discount rate was the Frontier's weighted average cost of
17 capital. And for that I relied upon the figures published by
18 Bloomberg for the relevant time period.

19 Q. Do you recall what you used for your weighted average cost
20 of capital for your September 2022 report?

21 A. Yes. Now, as I mentioned, Frontier had been publicly --
22 excuse me for a second. I'm a little hoarse.

23 Frontier had been publicly traded and then it
24 subsequently went public. So I found historical values for
25 Frontier's cost of capital, but nothing for the time period I

O4A3FRO3

Neels - Direct

1 was interested in, which was in May of 2020. So what I did in
2 my initial report was I gathered together all of the values I
3 could find in Bloomberg for airline weighted average cost of
4 capital, and I ran a statistical analysis based upon a variety
5 of independent variables, and came up with a statistical
6 prediction for what I thought Frontier's cost of capital would
7 have been in 2020.

8 As I recall that value came out to be 7.1 percent on
9 an aftertax basis.

10 Q. You subsequently acquired the Bloomberg weighted average
11 cost of capital percentages based on the public -- the new
12 public information and that different ticker?

13 A. That's right. It was, at this time, I believe Frontier was
14 privately held, but once it went public, it had retroactively
15 published financial information that allowed Bloomberg to do a
16 calculation. And if I remember correctly, I think that
17 discount rate that was published by Bloomberg for 2020 was more
18 in the neighborhood of -- I think it was 1.8 percent, if I
19 remember correctly.

20 Q. And so, why did you choose for the weighted average cost of
21 capital to use the Bloomberg rate, versus the rate that you
22 developed through the analysis, the regression analysis?

23 A. Well, I find, you know, if there is input to my damage
24 calculations that can be sourced to an independent third party
25 that is considered to be very reliable, I will typically use

O4A3FRO3

Neels - Direct

1 the source like that, simply to narrow the range of issues in
2 dispute.

3 Q. Now, are you aware in this case that Frontier employees
4 have stated that they internally use a discount rate of
5 10 percent?

6 A. I am.

7 Q. I'll represent, and counsel will correct me if I am
8 misstating the record, but there was a witness by the name of
9 Spencer Thwaytes who testified that the rate of 10 percent was
10 still in use when he left Frontier approximately nine months
11 ago.

12 Do you understand what a rate, a discount rate being
13 in use like that would mean if it's not changed for
14 three-and-a-quarter years?

15 A. Well, if it hasn't changed in a number of years, then
16 obviously it's not being updated regularly to reflect changing
17 conditions.

18 Q. And is there a method that you are aware of when a company
19 elects a discount rate, it doesn't change, and what they're
20 using it for?

21 A. Well, I mean, I think it's a practice that I've seen on a
22 number of different occasions. Many times -- many companies
23 have to repeatedly make, in the ordinary course of business,
24 financial decisions, and they will often have a rule of thumb
25 discount rate that they apply to inform those decisions.

O4A3FRO3

Neels - Direct

1 It's often referred to as a hurdle rate. It is
2 designed to give -- to make their internal decisions more
3 consistent, and more reflective of company policy. It's often
4 been the case in my experience that these hurdle rates are set
5 in excess of a company's cost of capital. But it is a
6 different animal from a cost of capital used for a different
7 purpose.

8 Q. And to your knowledge, how often is a weighted average cost
9 of capital calculated by Bloomberg?

10 A. That depends upon company policies. It varies greatly.
11 And it's more of an informal measure, as I said, designed to
12 give consistency to internal decision making.

13 Q. Separate from that analysis, focusing on Bloomberg, how
14 often is their reporting of various companies' weighted average
15 cost of capital?

16 A. They typically update their calculations on a quarterly
17 basis.

18 Q. Any more frequent than that?

19 A. Well, I couldn't say that -- I haven't looked into all the
20 dark corners of Bloomberg, but in my experience it's usually
21 every quarter they will come up with a revised calculation. It
22 seems to correspond to the issuance of quarterly financial
23 reports.

24 Q. I'd like to ask you some questions about how you treated
25 taxes in the net present value calculation.

O4A3FRO3

Neels - Direct

1 First of all, how did you analyze Frontier's damages,
2 on a pretax or on an aftertax basis?

3 A. I followed what's known as an aftertax approach. Which
4 is -- it's always been in my view and experience one of the
5 standard approaches one can take.

6 Q. Is that approach recognized in any learned treatises in
7 your field?

8 A. It is. I mean, I will say initially I recall having a
9 discussion with a Professor Franklin Fisher of MIT who was a
10 well respected and renowned economist and also very experienced
11 expert witness. And he explained the aftertax calculation to
12 me personally when I was working with him putting a damage
13 analysis together for purposes of his testimony.

14 It's also set forth in an article he wrote on
15 methodology for calculating damages, and it's also discussed in
16 the reference manual on scientific evidence.

17 Q. All right. And so, what is the purpose of that analysis?

18 A. Well, it's -- I think the purpose of any damage analysis is
19 to come up with a damage award which, if it is awarded, will
20 put the injured party back into the position they would have
21 been but for the injury.

22 So, it's in my experience, there are -- it's
23 recognized that there are two different ways of getting at
24 that. An aftertax approach or pretax approach. The pretax
25 approach simply doesn't deal with taxes at all. It calculates

O4A3FRO3

Neels - Direct

1 the nature of the injury on a pretax basis, and then it
2 calculates a damage amount to compensate for those injuries.
3 In the aftertax approach, one calculates first the damages
4 suffered by the injured party on a pretax basis. One then
5 adjusts them for the effect of those losses on the tax
6 liability of the injured party. That has the effect of lowering
7 the amount of injury, because some of it is offset by tax
8 savings.

9 Then when you sum those up, you have to recognize that
10 the amount that you have has been reduced because of tax
11 liability, and in order to make the injured party whole, the
12 compensation that's given has to be such that aftertax it will
13 cover all of the aftertax losses.

14 So if you think about an injury and a damage award,
15 there is money going out with the injury, and then money coming
16 back in with the award. So in an aftertax approach, recognize
17 the tax implications both of the injury, the money going out,
18 and the tax consequences of an award, part of which will
19 increase the tax liability of the injured party.

20 So it's designed those cancel out and the injured
21 party is left where it would have been but for the injury.

22 Q. All right. So, Dr. Neels I want to just clarify one point.
23 I have in my notes that the amount suffered by Frontier was
24 48,660,000, and I heard you say 49,660,000. I want to clarify
25 that for the record. If you need to look at anything, you're

O4A3FRO3

Neels - Direct

1 welcome with the Court's permission to look at your materials
2 that you have here.

3 A. Just in order to make sure that the record is accurate, I
4 would like to take a peek at my report.

5 Q. Is that in your folders?

6 A. I don't have a copy with me, unfortunately.

7 Q. All right. I think we'll just -- I don't have your report
8 with the current interest as of April 8.

9 A. Hmm-hmm. I may have that with me. If I could go check my
10 notes. May I?

11 MR. HOSENPUD: Your Honor, may the witness grab his
12 notes, please?

13 THE COURT: Yes.

14 THE WITNESS: Thank you.

15 A. I sincerely apologize for the fuzziness of my memory about
16 this. But, yes, the final -- the debt base number that it
17 calculated was 48,660,000. So it was 48.660 million dollars.
18 The WAC base number was \$46,906,000.

19 Q. So, that's the earlier figures that you gave in the start
20 of your testimony, is that right?

21 A. That's correct.

22 Q. So, let's turn back to the tax -- the aftertax treatment
23 for present value calculation.

24 Does calculating the damages on an aftertax basis in
25 any way award Frontier Airlines for taxes?

O4A3FRO3

Neels - Direct

1 A. It really does not. All it does is to put both sides of
2 the calculation on the same basis.

3 Q. What other factors go into the aftertax analysis of
4 Frontier's damages?

5 A. Well, in any calculation of damages, there are, you know,
6 in my view there are two steps involved. One is to calculate
7 what was the magnitude of the injury as of the time of injury,
8 and where the effects of the injury play out over time. That
9 will require some discounting. But then, if the injury
10 occurred some time ago, that means the injured party has been
11 denied the use of those resources for a period. So, if
12 Frontier eventually receives compensation for its injury, that
13 compensation should reflect not just the amount of the original
14 injury, but the time value of money, the fact it wasn't able to
15 put those resources to work over a period of time.

16 Q. And did you so calculate that as part of your figure?

17 A. I did. It's referred to sometimes as prejudgment interest.

18 Q. And what did you look at as sources to guide that
19 determination of the prejudgment interest?

20 A. Again, following what I regard as generally accepted
21 principles, the general view and the one I subscribe to is the
22 appropriate rate to apply in moving forward is the risk free
23 rate. Because not only has Frontier been denied the use of
24 those funds, it's been denied the chance to incur the risk and
25 be compensated for that. So, in bringing it forward and

O4A3FRO3

Neels - Direct

1 calculating prejudgment interest, I used as a risk free rate I
2 think the federal T-bill rate on an aftertax basis.

3 Q. What rate, what point in time did you analyze that federal
4 T-bill rate?

5 A. I looked at it on a period-by-period basis from the point
6 of injury up to the 8th of this month.

7 Q. And we may have touched it but I want to make sure I didn't
8 miss eliciting this information.

9 The date of injury that you used for the beginning of
10 your analysis was what?

11 A. Was May 8, 2020. The date when AMCK announced it was
12 terminating the Framework Agreement.

13 Q. And why is that an appropriate date for this analysis?

14 A. Well, that is the point in time when the actual world and
15 the but-for world began to diverge. At that point in time
16 Frontier knew it couldn't count on AMCK to finance the purchase
17 of the new aircraft. It had to begin scrambling to find
18 alternative lessors, and begin acting in various ways to deal
19 with the new situation it had.

20 So, I think that's the point where the, you know, the
21 two worlds one considers in the but-for approach start to
22 differ.

23 Q. And in calculating the aftertax cash flows, and applying
24 this tax gross up, what tax rate did you use and was that an
25 effective rate or a marginal rate?

O4A3FRO3

Neels - Direct

1 A. Well, the specific number that I used is, as I recall, was
2 22.8 percent. The specific way I derived that number was to
3 look at the effective tax rate of Frontier for the year 2019.
4 I picked that year specifically because that was the normal
5 year in which Frontier's tax liability wasn't moved around
6 dramatically by special considerations.

7 Q. What considerations are they?

8 A. Oh, well, for example, you know, during the period of the
9 pandemic, Frontier, like many airlines, received some amount of
10 public support. It had losses which, you know, it was able to
11 carry forward. Various provisions like that.

12 I picked 2019 as a normal year precisely for the
13 reason that in a normal tax year, one would expect the
14 effective rate to be very close to the company's marginal rate.
15 And conceptually it is the marginal rate that's appropriate in
16 this case. That would be the rate, if Frontier's income were
17 to increase by a dollar in some year, by how much would its tax
18 liability go up. That's the definition of the marginal rate.
19 And in 2019, that was very close to the effective rate.

20 Q. Did you verify whether that marginal rate was something
21 that could be counted on for subsequent years, or did that
22 change from a rate of 22.8 percent?

23 A. Well, I did look at that. Subsequent to the publication of
24 my report, I asked the staff I was working with to look into
25 that. And it turns out that the marginal rate is something

O4A3FRO3

Neels - Direct

1 that Frontier publishes in its annual financial statements. So
2 it actually published marginal rates for a number of years, and
3 those rates turned out to be very, very close to the rate that
4 I used, differing by only a few tenths of a percentage point.
5 The differences from year to year I think had to do with
6 changes in state tax provisions. The federal rate over this
7 period was constant because it hasn't changed since the passage
8 of the 2017 Tax Act.

9 MR. BUTLER: Your Honor, I'd just like to rise to
10 object. Dr. Neels is testifying at this point about a marginal
11 tax rate that is not disclosed in any of his several expert
12 disclosures. And there is no evidence in the record concerning
13 marginal tax rates.

14 MR. HOSENPUD: May I ask a question to support that
15 testimony, your Honor?

16 Thank you.

17 Q. Did you make reference in your report to an effective tax
18 rate as any sort of proxy for the marginal tax rate when you
19 did the analysis for 2019?

20 A. Well, certainly in picking the effective tax rate for 2019,
21 I was very clear that I selected that precisely because it was
22 a normal year where the tax liability wasn't affected by
23 special changing circumstances. So in that sense I did.

24 MR. BUTLER: Your Honor --

25 THE COURT: Was the rate set forth in the document you

O4A3FRO3

Neels - Direct

1 were using or did you calculate it?

2 THE WITNESS: The effective tax rate -- well, it is
3 calculated by dividing the tax liability by the pretax income.
4 So, I did the division. But those two numbers were certainly
5 set forth in the documents I cited in my expert report.

6 THE COURT: That's what you did.

7 THE WITNESS: Yes.

8 MR. BUTLER: Your Honor, just renew the objection.
9 He's talking about the estimate of tax rate which is disclosed
10 in the expert report, but there is no disclosure of marginal
11 tax rates, to my memory, anywhere in the expert disclosures
12 I've seen to date.

13 THE COURT: What do you have to say about that,
14 doctor? The division doesn't produce the marginal rate. It
15 the produces the whole rate.

16 THE WITNESS: Well, as I'm sure you know, your Honor,
17 a company's financial statements typically run on for 100 to
18 200 pages. And you know, I cited those financial statements as
19 sources that I relied upon. I didn't happen to discover that,
20 in Frontier's case, it reported its own marginal tax rate in
21 those same documents I cited. So I did cite the source, but I
22 did not point out the specific page on which it could be found.

23 THE COURT: Did you use Frontier's marginal rate?

24 THE WITNESS: I used --

25 THE COURT: Yes or no?

O4A3FRO3

Neels - Direct

1 THE WITNESS: Yes.

2 THE COURT: The ones you found in its publications?

3 THE WITNESS: Your Honor, to answer fully and
4 honestly, I wasn't aware at the time I prepared my report that
5 Frontier disclosed its marginal rate, but I did use the
6 information from its income statement in such a manner that I
7 was confident would bring me very close to the marginal rate.
8 What I was looking for was the kind of rate that would apply to
9 an additional dollar of income, not to -- you know, well, not
10 to the various kind of credits and additional taxes that come
11 into play given the complexity of the tax code. So I was
12 certain -- it was certainly my intention in using the effective
13 rate to get at something that would be constant over time. And
14 I was aware, too --

15 THE COURT: This is going to the weight of his
16 opinion, but not disqualifying him as a whole.

17 MR. BUTLER: Thank you, your Honor. And I'll address
18 this in our cross as well.

19 THE COURT: I assume it will be explored on cross.

20 MR. HOSENPUD: Thank you, your Honor.

21 THE COURT: While he's looking something up, let me
22 ask you a question, doctor.

23 Are you an economist?

24 THE WITNESS: I am.

25 THE COURT: What is the economist's definition of the

O4A3FRO3

Neels - Direct

1 word "cost"?

2 THE WITNESS: Well, it would be any expense incurred
3 in the course of producing the good or service, which is sold
4 for revenue. It is a very broad term in that sense.

5 THE COURT: I thought the definition was the value of
6 the most valuable thing, asset, forgone for lack of the
7 capital.

8 That's cost of capital, isn't it?

9 THE WITNESS: It would -- well, certainly if -- if you
10 think about the inputs to a production process --

11 THE COURT: Isn't that the economic definition of the
12 cost of capital?

13 THE WITNESS: The cost of capital will be the -- as I
14 understand that, it's the amount that a business would have to
15 pay to encourage investors to provide financing, to put money
16 in the business. Now, from the point of the view of the
17 investors, they will determine that by comparing what they
18 could earn by putting the money into Frontier, but what they
19 could earn by putting it into other uses.

20 So, I think you're right in that the value is
21 determined by the best alternative use of the resource. But
22 that's looking at it from the point of the view of the people
23 supplying that resource. From the point of view of Frontier,
24 that's what Frontier has to pay to get funds. And if there are
25 lots of other attractive investments, Frontier will have to pay

04A3FRO3

Neels - Direct

1 more in order to attract the resources it needs to conduct its
2 business.

3 So it's true in economics, one man's cost is another
4 man's revenue. That's part of it.

5 THE COURT: Thank you.

6 MR. HOSENPUD: Thank you, your Honor.

7 BY MR. HOSENPUD:

8 Q. So, Dr. Neels, did you also as part of your analysis review
9 Mr. de Jounge's report?

10 A. I did.

11 Q. And did you come to an understanding of the discount rate
12 that Mr. de Jounge used in connection with his analysis of
13 Frontier's damages?

14 A. I did.

15 Q. What discount rate was used?

16 A. He advocated the use of a 12 percent discount rate.

17 Q. And what formed the basis of that 12 percent discount rate?

18 A. My understanding of his argument is that he started with
19 the 10 percent rule of thumb rate that we discussed earlier.
20 And he characterized that as Frontier's own assessment of its
21 cost of capital. And he added to that a 2 percent increase
22 which he said reflected general increases in interest rates
23 between the time of the injury and the time he was offering his
24 opinion. If I recall his report correctly.

25 Q. And did you find flaws in that analysis?

O4A3FRO3

Neels - Direct

1 A. I did.

2 Q. What did you conclude?

3 A. Well, I think as I stated earlier, I think it's incorrect
4 to calculate this rule that's used in internal decision making
5 with the cost of capital, and certainly with a cost of capital
6 at a particular point in time. So I think that's, as a
7 starting point, that's probably incorrect.

8 I also think that in adjusting that rate upward based
9 upon movements in interest rate subsequent to the point of
10 injury, he's essentially using hindsight to increase the rate.
11 And I don't think that's conceptually appropriate. The
12 conceptual sources I rely upon for methodology suggest that the
13 right discount rate to use is one as of the time of injury.

14 Q. Did you also look at Mr. de Jounge's analysis of two of the
15 leases in this case and the methodology by which he calculated
16 the ultimate basic rent for those two leases?

17 A. I did.

18 Q. What did you determine was his methodology?

19 A. Well, what his methodology was or what I thought of his
20 methodology?

21 Q. First what was it.

22 A. All of the lease documents that I examined, both the ones
23 that were laid out, the terms that were laid out in the
24 original Framework Agreement and the terms of the agreements
25 that Frontier entered into with CDB and JSA, had formulas for

O4A3FRO3

Neels - Direct

1 calculating what the monthly lease payment would be. And the
2 effect of those formulas was to adjust -- they all provided a
3 starting point for what the base rental would be, and then a
4 formula for moving that rate up or down, depending upon how
5 interest rates moved between the time the agreement was entered
6 into and when the lease actually took effect.

7 So, in the case of JSA, there was a formula that it
8 specified a band within which the base rent wouldn't change.
9 Outside that band it would change.

10 Now, Mr. de Joung said he noted that the language was
11 slightly different in the basic agreement with JSA and the
12 leases in that one referred to a number as a percentage, and
13 the other just referred to it as a number.

14 So, the effect of that was that, you know, the
15 parameter that was defined as eight-tenths of a percentage
16 point in the original agreement, he interpreted that as
17 basically a fraction or 80 percent. Another number that was
18 referred to as .59 something, and was regarded as 59-hundredths
19 of a percentage point in the original agreement, he interpreted
20 as 59.7 I think it was percent interest. So he argued that the
21 actual leases specified that this sort of hold harmless band
22 spanned the range between 59 percent annual interest and
23 80 percent annual interest.

24 Q. In your experience, has the United States, or your lifetime
25 ever experienced interest rates in the 60 to 80 percent range?

O4A3FRO3

Neels - Direct

1 A. Not that I've seen, and I'm old enough to remember the
2 inflation of the '80s when one can earn 17 percent on a money
3 market fund when inflation was running at 18 percent. But I've
4 never seen anything like that. Also it's very -- it seems
5 fairly inexplicable to me why the parties would suddenly change
6 their thinking so drastically between the original document and
7 the leases.

8 Q. The use of 60 to 80 percent in the formula of the JSA
9 leases, would that still make available the three options that
10 that formula was designed to be a hedge for?

11 A. Well, as a practical matter, no. Because any interest rate
12 that we're likely to see or that we've seen over the past
13 10 years would have all fallen below the interest rate of
14 59.7 percent per year. So essentially made the formula
15 meaningless for practical purposes.

16 Q. Would it result in only a one-way direction for the rent
17 payments to go?

18 A. Yes.

19 Q. Which way was that?

20 A. To take it down.

21 Q. All right. And did you have an opportunity to see
22 information about what Frontier was actually paying on those
23 leases?

24 A. Yes. And in fact, the amount that Frontier was paying JSA
25 was consistent with the formula -- the interpretation of the

O4A3FRO3

Neels - Cross

1 formula I used, the formula that was laid out in the basic
2 agreement, and the interpretation of these .597 and .80 numbers
3 as percentage points rather than as fractions.

4 MR. HOSENPUD: Thank you. I have nothing further at
5 this time.

6 CROSS-EXAMINATION

7 BY MR. BUTLER:

8 Q. Good afternoon, Dr. Neels. Again my name is Jeff Butler.
9 You may remember me from your deposition and I'll be asking you
10 some questions this afternoon.

11 First I want to ask about your experience. Have you
12 had any experience specifically in analyzing the terms of
13 commercial aircraft lease agreements, apart from your
14 experience in this case?

15 A. I will say only since my deposition, I have -- was involved
16 in one matter in which I prepared a report that was used for
17 settlement purposes, and because the settlement is
18 confidential, I'm not really at liberty to disclose any
19 information about that. Other than the fact to say yes, in one
20 instance.

21 Q. And that one instance was after you prepared your initial
22 report in this case?

23 A. Yes.

24 Q. So is it correct that your first experience with commercial
25 aircraft leases in an expert capacity was in this case?

04A3FRO3

Neels - Cross

1 A. The first time I've ever done calculations relating to
2 them. I've done airline work before, and of course was aware
3 that was a commonly used source of financing, but I don't think
4 I've ever addressed it specifically before.

5 Q. I'm talking about calculating the cash flows associated
6 with an aircraft lease agreement. Have you done that before
7 this case?

8 A. I don't believe so.

9 Q. What has been your experience in calculating damages in
10 breach of contract cases?

11 A. I have done that on a number of occasions. You know, I
12 think it's actually it is a little bit hard to answer because
13 many cases there are multiple causes of action, and breach of
14 contract is one among a number of them. But there have been a
15 number of occasions that I've specifically addressed simply
16 breach of contract issues as the main cause of action.

17 Q. Could you give a ballpark estimate of the number of times
18 you have been retained as an expert in a breach of contract
19 case for the purpose of calculating damages?

20 A. Probably in the neighborhood of five or six, something like
21 that.

22 Q. In preparing your opinions for this case, did you have
23 access to any Frontier personnel, either by way of interview or
24 other interaction?

25 A. I did.

04A3FRO3

Neels - Cross

1 Q. Who were the Frontier employees you interacted with in
2 preparing your opinions?

3 A. I spoke on a couple of occasion with one employee, his -- I
4 think his first name is Sharath. His name has come up several
5 times.

6 Q. Would that be Sharath Sashikumar?

7 A. Yes.

8 Q. So, you have you've spoken to Mr. Sashikumar. Anybody else
9 at Frontier?

10 A. Not that I can recall as I sit here, no.

11 Q. You don't have to give me a blow by blow, but what was the
12 subject of your discussion with Mr. Sashikumar?

13 A. On the first occasion, he had put together some sort of
14 calculation of damages, and he was explaining to me what he did
15 and the assumptions behind it. And as part of that, he did
16 discuss this 10 percent rule of thumb that he used.

17 Q. So, we've seen in this case Mr. Sashikumar's calculation of
18 damages from October 2020. To the best of your recollection,
19 is that the damages model that you discussed with
20 Mr. Sashikumar?

21 A. That sounds about right as far as the date. I don't
22 remember the date specifically, but it was something that was
23 done early on.

24 Q. Did you agree or disagree with the methodology used by
25 Mr. Sashikumar in that internal analysis of damages?

O4A3FRO3

Neels - Cross

1 A. I disagreed on a number of points with what he did.

2 Q. And what were those points?

3 A. Well, one was that I disagreed with -- I thought his choice
4 of a discount rate was fairly arbitrary. As I recall, too, I
5 think it was the case that the Framework Agreement leases had a
6 provision that essentially allowed Frontier to opt out of the
7 lease after the eighth year. And he had calculated some value
8 for, you know, for the -- how that would have affected the
9 lease payments for years 9 through 12.

10 And in my calculations, I noted that the Framework
11 Agreement provided for this option, but I didn't put a value on
12 it. I just noted that I hadn't taken it into account, and that
13 by -- in not taking it into account, that made my calculation
14 of damages more conservative. But I didn't agree with the
15 valuation he put on it or at least didn't feel it was
16 sufficiently grounded in fact.

17 Q. Did you have any other disagreements with the methodology
18 used by Mr. Sashikumar?

19 A. There may have been -- I may have had -- taken issue with
20 the way in which he calculated what I would call the but-for
21 rental amounts. I don't know that he got down into the
22 specific details of exactly the specific interest rates that
23 would have been at issue, but my memory on that isn't very
24 clear.

25 The primary thing I remember is the discount rate.

O4A3FRO3

Neels - Cross

1 The secondary thing is the valuation of this early termination
2 option.

3 Q. In Mr. Sashikumar's calculation, did he attempt to
4 determine the tax effect of cash flows to Frontier?

5 A. I don't recall that he did.

6 Q. And did you have an issue with that or did you consider
7 that an alternative way of going about calculating damages?

8 A. Well, I think the pretax approach and the aftertax approach
9 are alternative ways, yes. So, I had no particular issue with
10 trying to do it on a pretax basis.

11 Q. Dr. Neels, are you a certified public accountant?

12 A. I'm not.

13 Q. Do you have any professional experience as a tax preparer?

14 A. No professional.

15 Q. Do you consider yourself an expert on the calculation of
16 corporate income tax?

17 A. I don't.

18 Q. Are you an expert in any area of taxation?

19 A. You know, I've certainly addressed tax issues over the
20 course of my work. Taxes are the reality we all live with, and
21 they certainly affect lots of decisions and calculations and
22 returns and so forth. So I've dealt with them a lot, but I've
23 never really considered myself to be a tax expert specifically
24 or put myself forward as an expert in taxes, if that's what
25 you're asking.

O4A3FRO3

Neels - Cross

1 I have a working knowledge of taxes, not really a
2 nuanced understanding of all their details.

3 Q. But you don't hold yourself out as an expert on any
4 particular area of taxation, correct?

5 A. I believe that's just what I just said, yes.

6 Q. Let me ask you about your methodology generally. As I
7 understand it, your calculation is basically analyzing the
8 difference between two sets of cash flows, those under the
9 hypothetical AMCK leases and those under the actual CDB and JSA
10 leases. Is that correct?

11 A. That's correct.

12 Q. And you're analyzing those cash flows over in each case a
13 12-year time period, right?

14 A. That's correct.

15 Q. Let me just put up for your viewing an exhibit from your
16 September 9 expert report. This is your original expert report
17 in this case, and I want to show you Exhibit 1 just as an
18 example of your analysis. And we'll just look at this zoomed
19 out. We're not going to focus on the individual figures so we
20 don't need to see them just yet.

21 Do you recognize this to be Exhibit 1 from your
22 original expert report?

23 A. That's what it looks like, yes.

24 Q. Does this indicate how you analyzed all those different
25 cash flows -- well, strike that.

O4A3FRO3

Neels - Cross

1 Let me ask you, does this analysis relate to MSN 9549?

2 A. It does.

3 Q. Is that the first aircraft that was delivered to Frontier
4 after the termination of the Framework Agreement?

5 A. I think it probably is because it has a lower number. But
6 I didn't memorize the MSN numbers.

7 Q. Well, at any rate this is one of the A320 aircraft that
8 delivered in July of 2020; is that correct?

9 A. Yes.

10 Q. Do you agree you can see the delivery date from the
11 upper-left hand of this complicated chart?

12 A. Yes.

13 Q. And this chart shows for, well, am I correct in
14 understanding that it looks like this chart is organized into a
15 number of different columns, and at the top there are headings
16 for the columns. As a whole set of there are three columns
17 that have the heading "cash flows" in the middle of the page,
18 right there. Cash flows under breached sale and leaseback
19 agreement AMCK. Is that right?

20 I'm sorry to make you pull out your readers,
21 Dr. Neels. I don't control the size of the print.

22 A. Yes.

23 Q. Would you agree those middle columns are analyzing the
24 hypothetical AMCK agreement?

25 A. Yes.

O4A3FRO3

Neels - Cross

1 Q. And then moving over to the right a little bit, there are
2 three columns analyzing the actual agreement with CDB?

3 A. Yes.

4 (Continued on next page)

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O4ABFRO4

Neels - Cross

1 BY MR. BUTLER:

2 Q. And in this chart are you seeking to set forth all of the
3 cash flows over a 12 year time period for each of those leases?

4 A. Yes, with the qualification that I noted in my report that
5 there were some provisions of the leases that I wasn't able to
6 put a number on. Although as I explain in my report, I believe
7 that the specific things that I ignore had the effect of making
8 my calculations, the damages implied by my calculations lower
9 than they would have been.

10 For example, the provision for sharing the cost of air
11 worthiness directives I think it was one I wasn't able to put a
12 number on, so it doesn't appear here. But other than that
13 calculation, this includes all the cash flows I was able to put
14 a number on.

15 Q. And that includes both the purchase price at the delivery
16 date, as well as all of the lease payments over the 12-year
17 term, correct?

18 A. Correct.

19 Q. And do I understand correctly that for all of these cash
20 flows you applied a tax rate to determine the after-tax effect
21 of these cash flows on Frontier?

22 A. I did.

23 Q. And you applied the same tax rate to cash flows for all 12
24 years, correct?

25 A. I did.

O4ABFRO4

Neels - Cross

1 Q. And that tax rate was approximately 22.8 percent, right?

2 A. That's correct.

3 Q. So your model assumes that Frontier has paid and will pay
4 that rate of taxes in each of the 12 years relevant to this
5 agreement, correct?

6 A. I think that's not entirely correct. I think that my
7 calculations assume that the incremental effect of these cash
8 flows on Frontier's tax liability will be in the magnitude of
9 22.8 percent of the incremental changes in the bottom line, not
10 that that would describe Frontier's overall tax liability
11 during this period.

12 Q. But for purposes of your model, you are applying a tax rate
13 as some kind of proxy for Frontier's tax liability; is that
14 correct?

15 A. Well, not for Frontier's overall tax liability. I mean,
16 I'm trying to look at the -- in a way the incremental effect on
17 Frontier's bottom line from the change in lease terms. And
18 what I'm interested in, therefore, not just the incremental
19 effect on its pretax income, but the incremental effect on this
20 after-tax income.

21 So I'm not really making a statement about its overall
22 tax liability, just about the effect of these changes on it.

23 Q. I understand. You're only analyzing the individual cash
24 flows, but for each individual cash flow is your model
25 attempting to estimate Frontier's tax liability associated with

04ABFRO4

Neels - Cross

1 that tax flow?

2 A. Yes. The incremental tax liability associated with each of
3 these cash flows.

4 Q. Just to finish off your methodology. So you calculate the
5 after-tax effects on Frontier of each of these cash flows for
6 both the hypothetical agreement and the actual agreement, and
7 then you subtract those to determine the difference as of the
8 date of each cash flow; is that correct?

9 A. Yes.

10 Q. And then I understand you employ the discount rate to
11 calculate the net present value of all those cash flows as of
12 May 8, 2020, correct?

13 A. Correct.

14 Q. And then you use a risk free interest rate to roll that
15 amount forward to roughly today's date; is that fair?

16 A. Yes.

17 Q. Did you employ the same methodology to cash flows for all
18 five of the aircraft?

19 A. I did.

20 Q. I want to focus on your application of a corporate tax rate
21 to cash flows over a 12-year time period. Have you used that
22 approach to calculate damages in any other breach of contract
23 case?

24 A. Not that I can recall, but I've always been aware that
25 pretax approach and the after-tax approach are all alternative

O4ABFRO4 Neels - Cross

1 accepted ways of doing this.

2 Q. I understand they are alternative approaches, but have you
3 ever used the after-tax approach that you're using here in any
4 breach of contract case?

5 A. As I stated, not that I recall as I sit here.

6 Q. Now, are you aware of any professional literature in your
7 area that recommends the approach you use in applying a tax
8 rate to analyze cash flows?

9 A. Well, I certainly am aware of literature that endorses this
10 as a valid approach. I think whether it's recommended that
11 depends upon the circumstances. But as this is regarded, I can
12 identify literature that endorses this as a valid way of doing
13 things.

14 Q. And what is that literature? Can you identify a particular
15 publication?

16 A. Two that come to mind. One is the reference manual on
17 scientific evidence put out by the federal courts. The other
18 is an article which I think I referred to in my deposition
19 which was the article by Professor fisher and Craig Romaine
20 which is entitled something like calculation of damages in
21 Janet Joplin's year book. And it does lay out this after-tax
22 approach as a way of calculating damages.

23 Q. Well, I'm glad you mentioned your deposition. You recall
24 that you gave a different answer to that question at your
25 deposition?

O4ABFRO4

Neels - Cross

1 A. Which specific question are we talking about here now?

2 Q. Well, I'll show you the question in a second.

3 Dr. Neels, do you recall giving a different answer at
4 your deposition?

5 A. My recollection is that if I could cite specific literature
6 on this point, and I think I said at the time I couldn't call
7 one to mind because, for one thing, I remember personally
8 having a conversation with Professor Fisher about this
9 approach. And he endorsed it and I regarded his opinions as
10 authoritative on this matter.

11 And if it had been perhaps 15 years since I had last
12 looked at Janis Joplin, so I forgot that the Janis Joplin paper
13 laid it out. Then of course subsequent to my deposition, I
14 went to what I regard as the authoritative source which is the
15 reference manual on scientific evidence. So I did, in response
16 to the question about my deposition, do a little bit of
17 additional work.

18 Q. Let's go back to your deposition testimony to just review
19 the chronology. I want to direct your attention to page 71 of
20 your deposition transcript, and I'm going to start with line
21 21.

22 I asked you, To your knowledge is this approach of
23 using of applying a tax rate to each cash flow a methodology
24 that's set forth in any kind of economic paper or publication?

25 And your answer was, goes over to the next page. I

O4ABFRO4

Neels - Cross

1 suspect it is because, but I couldn't name that publication
2 would be. You know, in the various, you know, organizations
3 I've worked with, we've talked a lot about this kind of stuff.
4 And my sense is always been that this is, you know, an
5 absolutely standard way of doing it. I recall having
6 discussed, you know, after tax calculations with Professor
7 Fisher, and how one had to, you know, if you calculated the
8 after tax damages, you had to gross up to account for the taxes
9 that would be paid on a damages award. So this is -- I mean,
10 in my experience this is an absolutely standard approach.

11 Do you recall giving that answer?

12 A. Yes.

13 Q. And I went on to ask you at line 17, But you're not aware
14 as you sit here today of any specific economic paper or
15 publication that endorses that approach to the calculation of
16 damages in a breach of contract case. Is that correct?

17 And you answered, If you're asking me to point towards
18 one, I couldn't name a title and an author.

19 And I followed up by saying, Question, in the Fisher
20 paper that you referred -- I apologize. The Fisher paper that
21 you referred to earlier, does it talk about the use of an
22 effective tax rate to adjust all of the cash flows in a damages
23 calculation.

24 Your answer was, I don't think that it does.

25 Do you recall giving that testimony?

O4ABFRO4

Neels - Cross

1 A. I see that's in the transcript, yes.

2 Q. Was that accurate testimony at the time that you gave it?

3 A. That was my understanding at the time I gave it. The name
4 of the paper Janis Joplin focuses on another issues that
5 addressed in that paper which is, whether you should take into
6 account in calculating damages information that only becomes
7 available after the time of injury.

8 And because of the uniqueness of that name, I always
9 tend to think of it in terms of the view that says you focus on
10 damages as of the point of injury.

11 Q. And this Janis Joplin paper that you're referring to from
12 Professor Fisher, does it recommend the use of using a single
13 effective tax rate to cash flows over a multi-year time period?

14 A. If I remember correctly in the paper presents a number of
15 formulas, and I think it is the case that it has one tax rate
16 that it uses in those formulas. I don't recall if it gets into
17 a discussion about what happens if tax rate vary over the
18 period of time.

19 Q. Let me show you, sir, your declaration submitted in this
20 case as part of the pretrial order. I want to direct your
21 attention to page 31 of that document where you talk about the
22 tax rate.

23 Do you recognize this as part of the declaration that
24 you have submitted?

25 A. Yes.

O4ABFRO4

Neels - Cross

1 Q. And this shows your methodology for calculating what you
2 call the effective tax rate, correct?

3 A. Yes.

4 Q. And it looks like you took two figures from the Frontier
5 annual report on form 10K for 2021; is that correct?

6 A. That's correct.

7 Q. And the two figures are income before income taxes and
8 income tax expense, correct?

9 A. Yes.

10 Q. Did you calculate your effective tax rate by dividing
11 income tax expense by income before income taxes?

12 A. Yes, I did.

13 Q. And were those the figures for 2019?

14 A. Yes.

15 Q. And it shows here that the effective tax rate that you came
16 up with was 22.8 percent; is that right?

17 A. Yes.

18 Q. Were any of the cash flows that you analyzed in this case
19 from 2019?

20 A. No.

21 Q. So isn't it true that all of the cash flows you analyzed
22 were from 2020 and later?

23 A. That's correct.

24 Q. Well, let me show you the form 10K from 2021 and see if you
25 recognize it. We marked this for identification as Defendant's

O4ABFRO4

Neels - Cross

1 Exhibit 7. We don't intend to offer it into evidence, but I'll
2 just make that statement for the record.

3 This appears to be the 10K. Do you recognize this as
4 the 10K for Frontier Airlines for the fiscal year ending
5 December 31, 2021?

6 A. Yes, that's what it looks like.

7 Q. Is this the 10K from which you obtained the information
8 that you used to calculate effective tax rate?

9 A. Yes, I think it probably is.

10 Q. I'm just showing you the cover page from that document, and
11 I just want to direct your attention to the middle parts of the
12 bottom of this page.

13 Do you see the trading symbol for Frontier indicated
14 on this document?

15 A. I do.

16 Q. What is that trading symbol?

17 A. ULCC.

18 Q. I'd like to turn the page of this exhibit, and it will take
19 us to page 96 from this form 10K which I think is the page you
20 cited in your expert report.

21 Do you recognize this chart as the source for your
22 data on income before income taxes and income tax expense?

23 A. Yes.

24 Q. And I see that focusing on the column for 2019 which is on
25 the right-hand side of the page. I see that the numbers for

04ABFRO4

Neels - Cross

1 income before taxes, before income taxes and income tax expense
2 correspond to the figures that you cite in your report, right?

3 A. Yes.

4 Q. And dividing 74 by 325 that's how you come up with 22.8; is
5 that right?

6 A. Yes.

7 Q. Just focusing on the number income tax expense. Does that
8 line from the 10K represent the actual amount paid of taxes
9 paid by Frontier in 2019?

10 A. Well, it's listed there as the income tax expense for year
11 2019. I just paid my income tax expense for 2023 and 2024, so
12 it's possible that that may not represent the amount of taxes
13 actually paid by Frontier in calendar year 2019.

14 Q. So is it your testimony, sir, that you're not sure whether
15 that line from the 10K represents the actual taxes paid by
16 Frontier in 2019?

17 A. Well, I'm not sure because, I mean, I would assume like
18 most public financials that that reflects accruals during the
19 year, so that would be the additional tax liability accrued
20 during the year. That doesn't necessarily mean that all of the
21 payments out occurred at the same time, or that no payments
22 were made in 2019 for tax liability associated with other
23 operating years. So I'm not really sure that that reflects the
24 actual amount in taxes paid by Frontier in that calendar year.

25 Q. In preparing your analysis, did you review any other

O4ABFRO4

Neels - Cross

documents to determine the amount of taxes actually paid by Frontier in 2019?

A. No, not in terms of a cash flow basis, not that I recall.

Q. So you didn't review any of Frontier's tax filings in preparing your report; is that right?

A. I did not.

Q. And as we pointed out or as I pointed out, you for 2019, you calculated the estimated tax rate by dividing those two numbers that are on right-hand side of the page. Did you do any analysis of the financial information for years prior to 2019?

A. I don't believe so, no.

Q. Did you review any of the financial data for Frontier for years prior to 2019?

A. Not that I recall.

Q. Do you know what Frontier's estimated tax rate was for any year prior to 2019?

A. I don't.

Q. Well, we have some other years shown on this page that also shows the same data for 2021 and 2020. Let's focus on 2020 first.

Using the same methodology, what is the estimated tax rate for 2020?

A. Well, I can't really do the arithmetic in my head, but it would be higher than that for 2019.

O4ABFRO4

Neels - Cross

1 Q. Let me help you with the arithmetic. You would be dividing
2 a negative 147 by a negative 372, correct?

3 A. Yes.

4 Q. If I tell you the outcome of that calculation is negative
5 39.5 percent, would that sound approximately correct to you?

6 A. 39 percent, yeah, I guess that sounds like that could be.

7 Q. Is that within the ballpark of 147 is 39.5 of 372?

8 A. Yes.

9 Q. What is it mean when an estimated tax rate is a negative
10 number?

11 A. Well, the estimated tax rate is a negative number that
12 would correspond to a situation either where the operating
13 income was a loss, but there was nonetheless taxes paid; or
14 there was a positive income, and there was some refund on
15 taxes.

16 Q. Explain to me the first of those situations. How would
17 there be a situation where there was a loss, but there was
18 still taxes paid?

19 A. This gets into the arcana of the tax code. As we discussed
20 earlier, I don't put myself forward as a tax expert. There
21 are -- I know lots of complicated reasons why the income one
22 calculates for under Gap could different from the income one
23 calculates for purposes of calculating tax liability.

24 As a for instance, there can be the way -- think about
25 capital asset. It might be depreciated in one way for purposes

04ABFRO4

Neels - Cross

1 of calculating financial statements, and a different way for
2 purposes of calculating taxes. I know, for example, sometimes
3 the tax law allows accelerated depreciation of investments in
4 order to incentivize more investments by reducing the tax
5 burden on them. Things like that can lead to differences
6 between operating income and taxable income. And as is
7 well-known, the tax code is big as Asia, so I'm not familiar
8 with all the provisions of it.

9 Q. Doesn't it suggest to you, Dr. Neels, that if the income
10 tax expense for 2020 was negative \$147 million that Frontier
11 paid no taxes in 2020?

12 A. That's what that would seem to imply.

13 Q. Would you agree that it seems to imply that Frontier
14 experienced a tax benefit in 2020?

15 A. Again that's what it would seem to imply.

16 Q. Using your methodology what is the estimated tax rate for
17 2021?

18 A. I mean, again, I don't have a calculator. I'd say roughly
19 it looks like it's about one-third or 30 something percent.

20 Q. I calculate the figure to be negative 29.1 percent. Does
21 that seem roughly correct to you?

22 A. No, because if you divide a negative number by a negative
23 number, you get a positive rate.

24 Q. Well, setting aside whether it's a negative or positive
25 number, would you agree that in tax year 2021, Frontier

O4ABFRO4

Neels - Cross

experience an income tax benefit of \$42 million?

A. That's what the financial statements imply.

Q. Does that imply to you that Frontier did not pay any income taxes in 2021?

A. That's what that implies.

Q. So this is the particular 10K that you looked at for purposes of your original report, but we now have the benefit of some additional financial data from subsequent years. So I want to show you the most recently 10K filed by Frontier which we've marked for identification as Defendant's Exhibit 8. And we can just -- the cover page looks the same, except this is for December 31, 2023, and let's go to the page of this report that has data for additional years.

Do you see on the right-hand side of this report there's the data from 2021, that we just looked at?

A. Yes.

Q. And Frontier had a tax benefit of that year of \$42 million, correct?

A. That's correct.

Q. For the following year 2002, it looks as though Frontier had an income tax benefit of \$8 million. Do you agree with that?

A. That's what it implied.

Q. Does that also imply to you that Frontier paid no taxes in 2022?

O4ABFRO4

Neels - Cross

1 A. That's what it would seem to imply.

2 Q. And then we come to 2023. It looks like in this year the
3 income tax expense is greater than Frontier's income before
4 income tax. Do you see that?

5 A. I see that.

6 Q. Does that imply that the estimated tax rate in that year is
7 more than 100 percent?

8 A. Well, I mean it depends on what you estimate the tax rate.
9 I define the effective tax rate as the tax expense divided by
10 the pre-tax operating income. And what I'm calling effective
11 tax rate in this case would seem to be over 100 percent in that
12 year.

13 Q. I'm sorry. I might have used the wrong terminology. The
14 terminology you used in your report is effective tax rate,
15 correct?

16 A. Yes.

17 Q. And that's the calculation that we've been talking about,
18 the one number divided over the other, correct?

19 A. Yes.

20 Q. Let me ask the question again. Do the figures for 2023,
21 imply an effective tax rate of greater than 100 percent?

22 A. They do.

23 Q. Do you have any insight into how Frontier's tax expense
24 could be greater than its income before income tax?

25 A. I can give an example. I don't know the specifics of what

04ABFRO4

Neels - Cross

1 led to this particular outcome, but I mentioned earlier that
2 one thing that one sees in tax provisions is the tax law will
3 allow accelerated depreciation of a capital asset.

4 What that would mean is that for tax purposes you
5 could have something that's being depreciated on a straight
6 line basis, and thus you have the same amount showing up as an
7 expense year by year on the operating income statement. But if
8 depreciation is being accelerated for tax purposes, that would
9 mean you would be showing higher depreciation than the earlier
10 years for tax purposes, which would reduce your tax liability
11 and lower your effective tax rate. And then in later years for
12 that same capital asset, you'd be showing less depreciation for
13 tax purposes than you would show for purposes of calculating
14 operating income. And so your tax liability would be greater
15 in the out years. That's an example of how you could get such
16 a thing. But again, there's lots of other special provisions
17 in the tax code that could lead to outcomes like that.

18 Q. Having reviewed these figures with me today, Dr. Neels,
19 would you agree that Frontier's effective tax rate varied
20 wildly in the years 2019 to 2023?

21 A. It did. Those were very, very turbulent years for the
22 airline industry.

23 Q. And in fact it varied from a benefit of 39.5 percent to an
24 expense of -- well, my calculation for 2023 was 134 percent; is
25 that correct?

O4ABFRO4

Neels - Cross

1 A. Well, certainly the rate varied quite a bit. I mean, I
2 think it's -- yes.

3 Q. Do you know what Frontier's effective tax rate is going to
4 be for this year, 2024?

5 A. No, this year hasn't happened yet.

6 Q. Is it fair to say you can't predict what's going to happen
7 with Frontier's effective tax rate for this year?

8 A. Not for its effective tax rate.

9 Q. And do you know what Frontier's effective tax rate is going
10 to be for any year after 2024?

11 A. No, I don't.

12 Q. Your model assumes that the effective tax rate is going to
13 be 22.8 percent for each of the years covered by your analysis;
14 is that's correct?

15 A. No, that's not correct. My model assumes that the
16 incremental tax liability associated on incremental changes in
17 Frontier's bottom line would be constant over the period at
18 22.8 percent. I make no assumptions about the overall tax
19 liability of Frontier and how that might change over time. So
20 my assumption here is much more limited than you characterized
21 it to be.

22 Q. Let me put it this way, your model applies the same
23 estimated tax rates to cash flows over all of the years covered
24 by your analysis, correct?

25 A. Well, to the incremental tax flows. I'm not calculating

O4ABFRO4

Neels - Cross

1 Frontier's overall cash flows. I'm just calculating the change
2 in cash flows associated with the change in lease terms.

3 Q. I understand, sir. I'm only talking about the cash flows
4 that you analyze and applied a tax rate to.

5 Would you agree with me that your model applies the
6 same 22.8 percent tax rate to all of those cash flows
7 regardless of which year they're expected to occur in?

8 A. Yes, I'm focusing on that small incremental change sitting
9 on top of all of the other sort of thrashing around the tax
10 liability that's provided for by the tax code, and by the
11 various special provisions put into effect to deal with the
12 pandemic.

13 So, yes, I'm just looking at that incremental tax
14 liability associated with incremental changes in income.

15 Q. Dr. Neels, isn't it pure speculation to assume that an
16 estimated or an effective tax rate of 22.8 percent should be
17 used for future years?

18 A. Well, it's not pure speculation. As I've noted, the
19 federal corporate tax rate hasn't changed since the passage of
20 the 2017 Act. And there's no discussion that I'm aware of
21 about changing that any time in the foreseeable future. So we
22 don't have any reason to expect major changes in those
23 provisions.

24 Q. Well, what expertise are you drawing on to reach the
25 conclusion that we cannot expect changes in the tax laws?

O4ABFRO4

Neels - Cross

1 A. I did not say that. I did not say we cannot expect it. I
2 said we have no particular reason to expect a change. That's a
3 different statement. There's no indication at the moment that
4 things are going to change or that the definition of income
5 will be altered in some way that might affect the tax status of
6 these incremental cash flows.

7 Q. Would you agree that if there were a change in the tax code
8 in say the next eight years, that that might affect the
9 legitimacy of your assumption that a 22.8 percent rate should
10 apply to all those years?

11 A. It would affect the legitimacy of my assumption that
12 those -- potentially affect the legitimacy of my assumption
13 that that same tax liability would apply. It would also affect
14 the calculation of the gross-up, the calculation of the taxes
15 that would be owed by Frontier on whatever damage award is
16 finally provided. So it's hard to say how that would come out.

17 Q. Okay. Well, I've only been focusing on the application to
18 cash flows. I'm going to get to the gross-up, and we'll talk
19 about that a little bit later.

20 Let me focus going back to the way that you analyzed
21 the individual cash flows in your analysis. I want to just go
22 through a specific example to make sure that I understand it
23 correctly. I want to show you, go back to Exhibit 1 that
24 complicated chart from Dr. Neels' original expert report. As
25 we discussed these are the cash flows associated with a

O4ABFRO4

Neels - Cross

1 particular aircraft delivery in July of 2020. Do you recall
2 that?

3 A. Yes.

4 Q. I want to focus on one of these cash flows to make sure I
5 understand it. The one I want to focus on is the actual
6 payment from CDB of the purchase price 48.5 million.

7 Do you see that?

8 A. Yes. Is there a question?

9 Q. I just asked can you see the purchase price was 48.5
10 million in July of 2020?

11 A. Yes.

12 Q. And did you assume that that's a benefit for Frontier?

13 A. Yes. I mean, that would be positive income coming in. I
14 should say positive revenue.

15 Q. Does your model assume that Frontier paid taxes on that
16 positive revenue?

17 A. It does.

18 Q. And at the rate of 22.8 percent, correct?

19 A. Correct.

20 Q. And according to your model that effectively reduces the
21 amount of the benefit to Frontier to 37.456 million; is that
22 correct?

23 A. That's correct.

24 Q. Now, was that 48.5 million paid to Frontier or was it paid
25 to Airbus?

O4ABFRO4

Neels - Cross

1 A. That was my understanding of the mechanics, that that
2 amount was paid to Frontier. Separately Frontier of course had
3 to pay Airbus for the purchase of the aircraft. And my
4 understanding is that the amounts shown in this Exhibit 1 don't
5 correspond necessarily to the amounts paid by Frontier.

6 Frontier had its own arrangements with Airbus, and
7 those arrangements governed how much it owed for the planes
8 that it acquired. This is the amount that applies as I
9 understand it to the sale of the aircraft after Frontier took
10 possession of it to the lessor.

11 Q. I want to unpack that a little bit.

12 First, you assume that that 48.5 million went to
13 Frontier; is that correct?

14 A. Yes.

15 Q. If it turned out to be the case that that 48.5 million was
16 instead paid to Airbus, would that effect your analysis?

17 A. I don't think that it necessarily would because I think as
18 I understood it, Frontier had entered into purchase agreements
19 with Airbus. And those agreements, to my knowledge, at least
20 I'm not aware that those were connected to the leases directly.

21 The leases, as I understood it, were separate
22 transactions where for perhaps a fleeting period of time,
23 Frontier took title of the aircraft and then sold it to the
24 lessors. And it's entirely possible that the payment might
25 have gone directly to Airbus as a convenient way of meeting

O4ABFRO4

Neels - Cross

1 Frontier's liability to Airbus, but my understanding is that
2 those are separate transactions.

3 Q. Well, if we assume that the payment went directly to
4 Airbus, would Frontier owe any taxes on that payment?

5 A. Well, I mean what's happening in this case is that the
6 overall tax liability reflects the net result of many, many
7 transactions, money coming in, money coming out. And what
8 happens is each of those transactions can have the effect of
9 raising the tax liability or lowering the tax liability.

10 Now what you're positing is a situation where the
11 incremental effect of the money coming in with the purchase
12 price is offset by the incremental effect of the money going
13 out to settle Frontier's obligations to Airbus so that they
14 might cancel out. But, of course, in the normal course of
15 business, revenues and expenses always cancel out. So I think
16 it's still the case in each individual transaction has some
17 incremental effect on the company's overall tax liability.
18 Some airlines will own their aircraft outright, and they will
19 go ahead and make the payment to the manufacturer, take title
20 to the plane. In that case, they have -- they get a tax
21 benefit from the cost of acquiring the plane.

22 So I think it's -- we're offering a little bit of
23 semantics I think here. It is true that the two transactions
24 sort of net each other out, but it doesn't mean that the
25 individual transactions don't each have incremental effects on

O4ABFRO4 Neels - Cross

1 the tax liability.

2 Q. Let me ask my question again. If CDB -- if we assume that
3 CDB made this \$48.5 million payment directly to Airbus, would
4 Frontier owe any taxes on that payment, on that amount?

5 A. Well, again, no, it wouldn't, but that's not the whole
6 story here because, suppose it were the case that the amount
7 that Frontier owed to Airbus for the purchase of this aircraft
8 was exactly 48,500,000. So in that case, the revenue gain is
9 perfectly offset by the amount that Frontier owes to Airbus.

10 Now my understanding is that the agreement with Airbus
11 was entered into before the breach occurred. So the amount
12 that Frontier owed to Airbus in the situation you're describing
13 is \$48.5 million. Now under the terms of the leases that would
14 have been entered into under the Framework Agreement, the
15 amount that Frontier was being paid was not 48.5 million, but I
16 believe it was 51 million. So in that case, yes, 48.5 million
17 would have gone to settle Frontier's obligation to Airbus, but
18 there would have been an additional \$2.5 million in gain
19 because under the terms of the Framework Agreement, the
20 purchase price paid by the lessor for the aircraft would have
21 been higher.

22 Q. But your assumption is that this \$48.5 million payment went
23 to Frontier, not to Airbus; is that correct?

24 A. Well, I think the more crucial assumption is that it may
25 have gone to Airbus to settle obligations that Frontier had

O4ABFRO4

Neels - Cross

1 with Airbus, but my understanding is those obligations had
2 nothing to do with this lease. They were entered into before
3 this lease was entered into and in fact before the Framework
4 Agreement was agreed to.

5 Q. And are you aware that in connection with the delivery of
6 an aircraft there might be circumstances in which Frontier
7 receives a payment back from Airbus?

8 A. That is possible. I mean, my understanding is, as I think
9 I indicated in my report, that in placing an order, it's
10 typical for an airline to put a deposit down and also to make
11 progress payments along the way as the aircraft is being built
12 and then the purchase price would have been agreed to between
13 the airline and Airbus in this case. So all of that would have
14 effected the amount that was due at the time of delivery.

15 Q. And so does that all imply that at the time of delivery
16 Frontier might be receiving a cash amount from Airbus?

17 A. Possibly.

18 Q. Did you calculate or try to determine the tax effect of
19 that payment on Frontier?

20 A. I did not because my understanding was that that would have
21 been the same in both the actual and in the but-for world. It
22 effected the agreement between Frontier and Airbus, which as I
23 understood it were entered into before the breach of the
24 Framework Agreement.

25 Q. This payment of 48.5 million was made in 2020, correct?

O4ABFRO4

Neels - Cross

1 A. I believe that's right. I'd have to see the column.

2 Q. We have to scooch over to the left-hand side of this and
3 see. Does that confirm for you that this payment was made on
4 July 29, 2020?

5 A. It does.

6 Q. We saw earlier though that the taxes paid by Frontier --
7 let me see the exact. The income tax expense for Frontier was
8 a negative number, correct?

9 A. That's correct.

10 Q. And I believe you testified that your understanding of that
11 is that frontier didn't pay any taxes in 2020, correct?

12 A. That's correct.

13 Q. But your model assumes that Frontier did pay 22.8 percent
14 in taxes on this particular payment; isn't that correct?

15 A. No, it doesn't necessarily say that. I mean, it says that
16 the size of the tax benefit that Frontier enjoyed as a result
17 of whatever provisions effected its bottom line tax liability
18 in this year might have been incrementally different.

19 In other words, if it owed extra taxes because of this
20 transaction, that would have made the tax benefit that it
21 actually realized some what smaller, because part of that
22 benefit would have gone to offset the incremental tax
23 liability.

24 Q. Dr. Neels, doesn't your model as shown on this page --
25 sorry. We need to scooch back to where we were talking about

04ABFRO4

Neels - Cross

1 with the \$48.5 million payment. In the first column here it
2 says undiscounted pretax cash flows, it says 48.5?

3 A. Yes.

4 Q. And then just to the right under the column undiscounted
5 post-tax cash flow, the figure is 37.4. Do you see that?

6 A. Yes.

7 Q. Doesn't your model assume that on this cash flow of 48.5,
8 Frontier is going to pay taxes of 22.8 percent?

9 A. No, it really doesn't. As I explained before, the tax
10 liability reflects the incremental tax effect of all of the
11 different transactions entered into by Frontier. And what this
12 calculation says is this particular transaction would have had
13 the effect of increasing incrementally the amount of tax that
14 Frontier finally owes.

15 So you really -- to say it would have paid 28 percent
16 more in taxes, you'd have to -- well, I suppose it would have
17 either paid 22.8 percent more of the difference in taxes, or it
18 would have lowered its tax benefit by that amount. Its overall
19 tax liability would have increased as a result of this
20 particular transaction. But, of course, the overall liability
21 reflects all of the transactions being entered into.

22 Q. Dr. Neels, isn't it true that in your model you take this
23 \$48.5 million benefit in 2020 and you reduce it using the rate
24 of 22.8 percent to 37.4 million?

25 A. Yes.

O4ABFRO4

Neels - Cross

1 Q. And that's even though it appears that Frontier did not pay
2 any taxes in 2020, correct?

3 A. That's correct.

4 Q. I want to move to a different topic, but to talk about that
5 I just want to review for you the various reports and
6 submissions that you made in this case to make sure we're on
7 the same page.

8 You give an initial expert report in this case on
9 September 9, 2022. Does that sound correct?

10 A. That's correct.

11 Q. And then your deposition took place on October 25, 2022,
12 correct?

13 A. That's correct.

14 Q. And shortly after your deposition you submit to us a
15 supplemental report on, I think it was October 28, 2022; is
16 that right?

17 A. That sounds correct.

18 Q. So thereafter as part of the pretrial order process, you
19 submitted a declaration on September 21, 2023, correct?

20 A. Correct.

21 Q. And finally we received an addendum to your declaration on
22 February 16, 2024, does that sound right to you?

23 A. It does.

24 Q. So you essentially provided four versions of your analysis
25 to us or four -- one version and three updates to your

O4ABFRO4

Neels - Cross

1 analysis. There's the initial report, a supplemental
2 statement, your declaration and an addendum; is that correct?

3 A. That's correct.

4 Q. So we'll be talking about all four of those things, and
5 I'll try to be clear what I'm talking about as we go through
6 them. I want to talk about discount rates, and the discount
7 rate that you used in your net present value analysis.

8 Pardon me. Before we do that, I realize I forgot to
9 address one topic on the tax rates. We saw your formula for
10 calculating effective tax rates. Did your report include any
11 calculation of Frontier's marginal tax rate?

12 A. Not that I recall.

13 Q. So is it true that your -- the tax rate calculated and used
14 in your report was the effective tax rate that we've been
15 talking about, correct?

16 A. It was the effective tax rate for that specific year which
17 was selected because it was not distorted by a lot of
18 significant pandemic-related special considerations.

19 Q. I understand your position on that, but my question now is,
20 does your model use Frontier's marginal tax rate in any
21 capacity?

22 A. Well, it uses that effective rate as a marginal rate. And
23 as we've just been discussing and going through exhibit 1, I
24 think essentially what I'm doing is looking at a whole series
25 of transactions, some that occurred in the actual world, some

O4ABFRO4

Neels - Cross

1 that looked and occurred in the but-for world. And I'm
2 calculating an incremental change in tax liability associated
3 with all of those. Then I add that up, and that brings me to
4 my overall conclusion.

5 So in terms of the way I use that rate, I am using it
6 as a marginal rate, but I didn't calculate it specifically as a
7 marginal rate or referred to it as a marginal rate in my
8 report.

9 Q. Let me define my terms a little more carefully. We saw the
10 estimated tax rate that you calculated and used in your report,
11 correct?

12 A. The effective tax rate.

13 Q. Let me ask the question again so the record is clear.

14 We saw the effective tax rate that you calculated and
15 used in your report, correct?

16 A. Yes.

17 Q. You testified today about a marginal tax rate calculated by
18 Frontier and included in their annual reports. Do you recall
19 that?

20 A. I do.

21 Q. Focusing on that particular marginal tax rate, the one
22 calculated by Frontier and included in their reports, did you
23 use those rates anywhere in your analysis?

24 A. Not specifically, but they only differ from the rate I did
25 use by one or 2/10 of a percentage point.

O4ABFRO4

Neels - Cross

1 Q. And is it also true that in your various expert reports
2 that you've submitted in this case, expert report and
3 amendments to your expert report, you do not discuss those
4 particular marginal tax rates that's are published by Frontier?

5 A. That's correct. I did not refer to them in my report.

6 Q. Let me go back to your discount rates, and I want to show
7 you your initial expert report from September 9, 2022, page 23.

8 This is the section of your report talking about the
9 two different -- beginning to talk about the two different
10 discount rates that you, and this one is talking about a debt
11 base discount rate. Do you see that?

12 A. Yes.

13 Q. And how did you -- this discloses that you calculated that
14 based on a particular loan agreement involving Frontier; is
15 that correct?

16 A. That's correct.

17 Q. And the rate that you calculated I think is shown maybe on
18 the next page, paragraph 46, that's the carry over paragraph.
19 It looks like you calculated that rate to be 2.87 percent; is
20 that correct?

21 A. That's correct.

22 Q. As we said that was the interest rate from a particular
23 loan from the U.S. Treasury Department for up to \$578 million.
24 Is that consistent with your memory?

25 A. That's what I recall, yes.

04ABFRO4

Neels - Cross

1 Q. And the date of that particular loan agreement was
2 September 28, 2020, correct?

3 A. Yes.

4 Q. And the interest rate that associated with that loan was
5 LIBOR plus 2.5 percent; is that right?

6 A. Yes.

7 Q. And that was as of September 28, 2020, correct?

8 A. Yes.

9 Q. Why did you use that particular loan to determine your
10 debt-base discount rate?

11 A. At the time I was looking for a secured loan that was
12 entered into by Frontier in the normal course of its business
13 at a date close to the time of injury, and this was the closest
14 I could come.

15 Q. Did Frontier have other secured loans outstanding in 2020?

16 A. I believe that it did. My recollection is that they were
17 entered into an earlier time period, so I was looking for a
18 transaction that actually occurred and was close as possible to
19 the date of the Framework Agreement, the date of the
20 termination of the Framework Agreement.

21 Q. Are you aware of what happened to interest rates in 2020,
22 during the first year of the pandemic?

23 A. Yes.

24 Q. And what happened to them?

25 A. They fell.

O4ABFRO4

Neels - Cross

1 Q. So you specifically chose a time period in which interest
2 rates overall had fallen to the lowest level that we've seen in
3 our lifetimes; is that correct?

4 A. Again, following the principle that I should get a rate
5 that was as close as possible to the time of the act of injury,
6 yes, that's what led me to the specific rate.

7 Q. Did you investigate the interest rates that Frontier was
8 paying on those other secured loans in 2020?

9 A. Not that I recall. I said I believe they were entered into
10 earlier.

11 Q. Okay. So I want to move to page 24 of your report. We're
12 on it already. We can just move up to your derivation of
13 weighted average of cost capital base discount rates.

14 And you say in paragraph 48, let's see, that you tried
15 to get this figure from Bloomberg, but that unfortunately --
16 this is in the third line, unfortunately Bloomberg contained no
17 information on Frontier. Do you see that?

18 A. Yes.

19 Q. And we heard that story on your direct testimony, that's
20 because you were using the wrong ticker symbol for Frontier; is
21 that right?

22 A. Yes. I was using the ticker symbol it had prior to its
23 period as a privately held company.

24 Q. And you didn't have the right ticker symbol even though the
25 ticker symbol was on the 10K that you used to calculate the

O4ABFRO4

Neels - Cross

effective tax rate?

A. That's correct.

Q. As I understand it, weighted average cost of capital or WACC as we refer to it is something that can be calculated by a company from data of its capital structure. Is that your understanding as well?

A. Yes.

Q. Did you ask Frontier to tell you its weighted average cost of capital?

A. I did not.

Q. Why not?

A. well, my preference is in preparing an expert report is to rely on normal course of business information and information produced by reliable third parties. If I had asked Frontier to come up with a weighted average cost of capital that I was going to use in my -- for litigation purposes in preparation of my expert report, I would have had to inquire into how they were doing it. I would have had to make sure that they were not using assumptions that worked in their favor. And I thought it was simpler, more reliable to use published third-party information and reliable statistical methods rather than to involve Frontier in the preparation of my expert report.

Q. I raised this issue at your deposition, and you told me the same thing that you did not make any inquiry of Frontier.

O4ABFRO4

Neels - Cross

1 After your deposition did you make any inquiry to determine the
2 weighted average cost of capital that Frontier is calculating
3 itself?

4 A. No, I didn't. Immediately after the deposition, I
5 discovered that the figures public by Bloomberg fell under the
6 different ticker symbol, and I focus on those for the basis of
7 my opinion.

8 Q. Focusing on your initial report which we're displaying on
9 the page here, at that time you did not have a weighted average
10 cost of capital from Bloomberg, and you did not have a weighted
11 average cost of capital from the company. So what did you do
12 at that time to calculate weighted average cost of capital?

13 A. I ran what's known as a regression analysis. I constructed
14 a statistical model that enabled me to come up with a
15 prediction for Frontier for the specific time period I was
16 interested in.

17 Q. And is that calculation shown in these subsequent pages of
18 your report, and maybe we could just flip through them and
19 maybe zoom out a little bit. I see several pages describing
20 your regression analysis. Go ahead and flip another page.
21 Please go ahead, one more page. We finally come to a
22 conclusion several pages later, and there's another table.
23 Let's keep going with your regression analysis.

24 Now we get to the conclusion I believe of this table.
25 Nine is the next page. So keep going. Right. You do a

O4ABFRO4

Neels - Cross

1 regression analysis which you describe over the course of a
2 number of pages of your report, and the outcome of that is a
3 figure of 7.09 percent; is that correct?

4 A. That's correct.

5 Q. So in your initial report you proposed two different
6 discount rates for calculating the present value of the cash
7 flows in this case, 2.87 and 7.09, correct?

8 A. That's correct.

9 Q. But you advocate the lower number and the higher number is
10 only an alternative, correct, at least at that time?

11 A. Yes, I have not changed my opinion that the appropriate
12 discount rate should be a debt-base discount rate rather than a
13 weighted average cost of capital base discount rate.

14 Q. I understand that. Does using the lower number increase
15 your calculation of Frontier's damages in this case?

16 A. It has that effect, yes.

17 Q. So the lower the discount rate, the higher the damages,
18 correct?

19 A. Yes.

20 Q. Let me go to the discount rates that you show in your
21 supplemental statement dated October 28. And as we reviewed,
22 your deposition was on October 25th, 2022, and then a few days
23 later you served a supplemental report on October 28.

24 Do you recall that?

25 A. Yes.

O4ABFRO4

Neels - Cross

1 Q. And since this report was submitted after your deposition,
2 defendants haven't had any opportunity to ask you questions
3 about this supplemental statement so I have some for you today.

4 Isn't it correct that this was unavailable at your
5 deposition so this was not covered as a topic of your
6 deposition?

7 A. That's correct.

8 Q. So let's put that up on the screen. Let's look at page
9 one, paragraphs two to three. This describes the fact that you
10 weren't aware of the ticker symbol of Frontier, and you learned
11 that you might have been using the wrong one at the deposition
12 and you discovered the right one, correct?

13 A. Well, I think that I put it a little bit differently. I
14 found the correct one for Frontier for its first bought as a
15 public company before it went private. I did not find the one
16 for the second period after it became public again.

17 Q. Right. Even though that was the one on the 10K, you
18 glossed over that when you were looking at that document,
19 correct?

20 A. Well, yes, I mean, I didn't pick up on that for which I
21 apologize.

22 Q. So looking at page two of this document, it looks like that
23 armed with the correct ticker symbol for Frontier, you were
24 able to find information about weighted average cost of capital
25 on Bloomberg, correct?

O4ABFRO4

Neels - Cross

1 A. That's correct.

2 Q. And you display the information you found in this chart on
3 page two; is that right?

4 A. That's correct.

5 Q. And according to this chart, Frontier's weighted average
6 cost of capital varied from 1.8405 as of 12/31/2020, to 6.97 as
7 of June 30, 2022; would you agree with that?

8 A. Yes.

9 Q. And just moving down the page a little bit to paragraph
10 six. You make some observations about this chart and you
11 say -- the first one that you make in paragraph six is that,
12 all but two of these weighted average cost of capital values
13 are similar in magnitude to the 7.09 percent rate that you came
14 up with in your original report; is that right?

15 A. That's correct.

16 Q. Were you making that observation to suggest that the rate
17 of 7.09 in your initial report is the correct rate?

18 A. Well, using it to make the point that it was a reasonable
19 rate to use.

20 Q. Turning to the page of your report in paragraph eight. You
21 state "The results of discounted cash flow calculations are
22 generally sensitive to the discount rate used." What did you
23 mean by that?

24 A. We discussed this a bit earlier. I think my goal in the
25 first step of my analysis is to calculate the present value of

O4ABFRO4

Neels - Cross

1 damages as of the time of injury, that requires the use of a
2 discount rate. And given the cash flows that are set forth
3 under the terms of the actual and but-for leases, if you change
4 the discount rate, it changes that present value. And that's
5 the sense in which it's sensitive to the choice of discount
6 rate.

7 Q. Would you agree that the discount rates used can make a big
8 difference in a discounted cash flow analysis of damages?

9 A. Well, it can make a difference.

10 Q. Then in this same paragraph in the next sentence of
11 paragraph eight it says "In table S2 below, I present the
12 results of my damages calculations using a variety of
13 defensible discount rates in order to quantify the effects on
14 damages if I had instead used discount rates based on recently
15 discovered information reported on Bloomberg." Do you see
16 that?

17 A. Yes.

18 Q. And next page there's a table S2 which shows a total of six
19 damages calculation using different discount rates; is that
20 right?

21 A. Yes.

22 Q. And according to your supplemental report you say that all
23 of these results are defensible; is that right?

24 A. Yes, I believe so.

25 Q. And the lowest of these calculations is 35.9 million, and

O4ABFRO4

Neels - Cross

1 that it looks like that was calculated using the 7.09 percent
2 regression calculated weighted average cost of capital from
3 your initial report; isn't that right?

4 A. That's correct.

5 Q. And the other figures in this chart are all larger because
6 you used lower discount rates for those calculations, correct?

7 A. Yes. I mean, lower, and certainly in the case of the WACC,
8 I used one based on an actual WACC calculation as opposed to a
9 statistical estimate.

10 Q. Well, the lowest rate that you used was 1.0445 percent; is
11 that correct?

12 A. I believe that's the debt-base rate that I used.

13 Q. Is that the rate that you used, 1.0445 percent?

14 A. That sounds -- yes.

15 Q. And the rest of the rates that you used were between 1
16 percent and 7 percent?

17 A. That's correct.

18 Q. Was it your opinion at the time of this supplemental report
19 the discount rates between 1 percent and 7 percent were all
20 defensible for this calculation?

21 A. Yes. I mean, and I've explained a number of times with my
22 direct and here that I believe the debt-base rate is the most
23 appropriate because of the nature of the cash flows we're
24 looking at and the riskiness thereof. But I recognize that
25 it's often -- I've recognized since the beginning that

O4ABFRO4

Neels - Cross

1 reasonable people can differ and sometimes a WACC base rate is
2 used, so I do present a WACC base rate. I think both of those
3 are defensible.

4 I do believe that the actual calculated rates
5 published by Bloomberg are more reliable than -- certainly than
6 the statistical estimate that I used. I also believe that the
7 most appropriate is the one as of the time of injury, which
8 would be the 2020 value one that's shown in the middle row of
9 that table. They may all be defensible, but they're not all
10 created equal.

11 Q. Let's move on to the discount rates that you show in your
12 declaration submitted in connection with the pretrial order.
13 I'm going to show you your declaration page 30, table D7.

14 This table shows four -- now it shows four different
15 discount rates. So you had six discount rates in your
16 supplemental report. By the time of your declaration, you're
17 down to four; is that correct?

18 A. Yes.

19 Q. And again these rates range from just over 1 percent to
20 just over 7 percent at the high-end, correct?

21 A. Yes.

22 Q. And is it still your opinion that each of these rates is
23 defensible?

24 A. I don't believe that the statistically base rate is
25 defensible given the ability of an actual rate, so I wouldn't

O4ABFRO4 Neels - Cross

1 agree with that statement.

2 Q. I was using your word from your supplemental report. Did
3 something change between your supplemental report and your
4 declaration to make you conclude that the 7 percent rate was no
5 longer defensible?

6 A. As we're discussing the meaning of the word "defensible," I
7 think there may be differences of opinion that would lead one
8 to consider a WACC base rate as opposed to debt-base rate. But
9 I think it's conditional on a belief that a WACC base rate is
10 appropriate.

11 I can't see a justification for using a statistical
12 estimate when an actual value is available. I would perhaps
13 qualify what I said in my supplemental report based on that
14 reasoning as we go into this in more detail here.

15 Q. Is part of what you're saying that you no longer stand by
16 the regression based analysis that you did in your original
17 report?

18 A. I feel an obligation to use the best available evidence,
19 and that obligation leads me to believe that the published WACC
20 is better than the statistical value that I used in my report.

21 Q. And is the Bloomberg WACC better than the WACC calculated
22 by a company?

23 A. Well, that would depend a lot on how the company calculated
24 it and for what purpose and when and all sorts of things like
25 that, so it's impossible for me to give a general answer to

O4ABFRO4

Neels - Cross

1 that question. I think for purposes of litigation, using a
2 third-party value has obvious -- it is highly respected, and
3 when you use third-party, it has obvious benefits.

4 Q. Is it possible that the company has better information
5 about its capital structure at any particular point in time
6 than Bloomberg?

7 A. It undoubtedly has more information about all the specific
8 of its capital structure. On the other hand, Bloomberg is
9 taking a broad look at big market shifts in lots of companies,
10 and it brings that broad market perspective that I think would
11 be difficult for Frontier to achieve. So it has some benefits,
12 but it also has some weaknesses too. Bottom line is, I'm going
13 to go with Bloomberg as the more credible source.

14 Q. And moving down the page in paragraph 66 of this
15 declaration. You express that point of view, you think that
16 the right rate to use is the lowest of these rates, correct?

17 A. I believe in paragraph 66 I believe the debt-base rate is
18 the most appropriate one.

19 Q. Is that the lowest rate shown here?

20 A. The lowest rate in the table is a debt-base rate.

21 Q. Let me make sure I understand your opinion. Is it your
22 opinion today that the lowest of these rates shown on this page
23 is the correct one to use?

24 A. In my opinion, yes.

25 Q. And that's the one that yields the highest amount of

O4ABFRO4 Neels - Cross

1 damages for Frontier, correct?

2 A. As it works out, yes.

3 Q. You also present an alternative rate, which I believe is
4 the second lowest rate shown in this page; is that correct?

5 A. Yes, that is the WACC base rate published by Bloomberg.

6 Q. So if the Court rejects the lowest rate, you recommend the
7 second lowest rate, correct?

8 A. Well, I recommend the second lowest rate if the Court
9 offers an opinion that a WACC base rate is the most appropriate
10 rate to use here.

11 Q. And that would necessarily entail not using the debt-base
12 rate, correct?

13 A. If the Court rules that a WACC base rate is appropriate,
14 then the use of the WACC base rate is appropriate.

15 Q. Isn't it true, sir, that if the Court rejects the lowest
16 rate, your recommendation is to take the second lowest rate?

17 A. Not necessarily. I mean, it could be that the Court
18 rejects the 1.04 percent rate, but believes that the 2.2
19 percent rate which is based upon a specific debt instrument
20 entered into by Frontier is the more appropriate way to go, in
21 that case it would not be necessarily going into the second
22 lowest rate in the table.

23 Q. But isn't it true that your alternative recommendation for
24 the Court is to use the second lowest rate on this chart?

25 A. That is my recommendation.

O4ABFRO4

Neels - Cross

1 Q. If the court decides not to use the lowest rate or the
2 second lowest rate, what rate would you recommend?

3 A. Well, I'd have to understand the Court's reasoning and the
4 reasoning why it may have rejected one or the other. I think
5 in that case that would affect my decision here, and affect --
6 if I were asked to give advice to the Court, that would affect
7 the advice I would give.

8 Q. Now, as we discussed earlier, Dr. Neels, you calculate the
9 net present value of all these cash flows as of the date of
10 termination May 2020, correct?

11 A. That's correct.

12 Q. And you use a risk free interest rate to calculate interest
13 from May 8 to 2020, to the present; is that right?

14 A. Yes.

15 Q. And the rate that you used has changed in your various
16 reports, but I gather that's because you updated it with
17 additional interest rate information, correct?

18 A. That's correct.

19 Q. And interest rates generally had been on the increase in
20 the past couple of years; is that correct?

21 A. That's correct.

22 Q. And the latest risk free rate you calculate is 1.9 percent,
23 1.928 percent to be specific, correct?

24 A. That's correct.

25 Q. And is it still your opinion today that 1.9285 percent is

O4ABFRO4

Neels - Cross

1 the correct rate of interest to calculate prejudgment interest
2 as of today's date?

3 A. Yes, that is the summary of the overall effect of
4 calculating interest at the risk free rate over the relevant
5 period up to the present.

6 Q. Let me ask you about your final calculation of damages, and
7 I want to show you your declaration pages 44, start with page
8 44.

9 Is this a summary of your damages calculation using
10 the debt-base interest rates of 1.0445. Percent I should say
11 you?

12 A. I'm looking at the footnotes. Yes, I can see that. This
13 is based upon the debt-base rate.

14 Q. This is based on the lowest of the interest rates that you
15 have calculated, correct?

16 A. It's based upon the rate I believe is most appropriate
17 which happens to be the lowest rate.

18 Q. I understand. Turning to the next page, there's another
19 chart that's showing your alternative calculation using the
20 second lowest rate; is that correct?

21 A. This is the calculation showing damages in which the
22 discounting is based upon the WACC rate published by Bloomberg.

23 Q. And that's the second lowest rate in your chart we saw
24 earlier?

25 A. Yes, it happens to be the second lowest rate.

O4ABFRO4

Neels - Cross

1 Q. Is the discount rate the only difference between these two
2 summary damages calculations?

3 A. I believe that it is.

4 Q. And in each of these summaries, you show the amounts
5 associated with each of the MSNs, and then immediately below
6 that you have a line that says after-tax value of payment
7 required to make Frontier whole.

8 And in this chart at least that figure is \$35,571,000;
9 is that correct?

10 A. Yes.

11 Q. Is that the amount that you calculate that would be
12 required today to compensate Frontier for all the differences
13 in the cash flows between the AMCK leases and the replacement
14 leases?

15 A. I don't believe so simply because this is -- let's see.
16 Wait a second here. Well, I guess it appears to be, yes. The
17 pretax damages. I'm a little unclear from this where the
18 prejudgment interest is. I don't know whether that's included
19 in the calculations that are supporting lines one through five
20 which are exhibits D7 through D15. So I don't know if this
21 includes prejudgment interest or not. I can't tell from this
22 table.

23 Q. Whether it includes prejudgment interest or not, does this
24 figure capture all of the cash flow differences between the
25 leases for all five aircraft and applying its discount rate to

O4ABFRO4

Neels - Cross

1 calculate the net present value of those differences?

2 A. As of the time of injury, yes, it does.

3 Q. But you just said that you don't know whether this includes
4 prejudgment interest or not?

5 A. I'm a little unclear about that.

6 Q. Well, this chart is your summary of all the damages,
7 correct?

8 A. As of September 21, 2023.

9 Q. Right. So wouldn't you assume that your prejudgment
10 interest is included in here somewhere?

11 A. I would expect that, yes.

12 Q. And wouldn't it be included in your payment required to
13 make Frontier whole figure?

14 A. I would expect it to be, but that figure is the sum of
15 lines one through five which are both in those other exhibits.
16 I don't want to misspeak here, just that I probably have to
17 look at those exhibits to figure out whether they add in the
18 prejudgment interest or not.

19 Q. I understand, but is there any place else in this chart
20 where you would expect the prejudgment interest to be added in?

21 A. If it's in here, that's where it would be.

22 Q. So you first provide that amount of the amount required to
23 make Frontier whole, and it looks like you apply a tax rate to
24 calculate taxes to be paid on damages award, correct?

25 A. That's correct.

O4ABFRO4

Neels - Cross

1 Q. And that amount is just over \$10 million, correct?

2 A. Yes.

3 Q. And then you come to a final figure of \$46 million,
4 correct?

5 A. Yes.

6 Q. Is that the amount that you recommend, the total amount of
7 damages that you recommend?

8 A. Well, conditional on the Court ruling that a WACC base
9 discount rate is the appropriate discount rate, and this is
10 only through September 21, 2023. It doesn't include interest
11 all the way up to the present, but subject to those
12 qualifications, yes.

13 Q. I just want to understand how you're getting to that
14 figure. You're assuming that an award is appropriate in the
15 amount of 35.5 million. And is it true you're also assuming
16 that Frontier will pay 22.8 percent in taxes on that damages
17 amount, on that damages award?

18 A. That's not quite right. As I described earlier in doing an
19 after-tax calculation, you take into account the taxes implicit
20 in the but-for cash flows. And you also take into account the
21 taxes that would be implied by the award itself. I think what
22 this particular table says is that the amount that would be
23 paid on the final award, which is the 46.058 million would be
24 10,487,00.

25 And that taking that tax into account would mean that

O4ABFRO4

Neels - Cross

1 on an after tax basis, Frontier would be left with 35,571,00
2 which I believe is the correct value conditional on a WACC
3 discount rate as of September 21 last year.

4 Q. So is it your opinion that in order to compensate Frontier
5 fully the Court should award, not only the amount necessary to
6 make them whole, but also the taxes that Frontier's likely to
7 pay on that amount?

8 A. Well, if you're doing an after-tax approach, you want to
9 make them whole on an after-tax basis. And we haven't gone
10 into this, but if I had done it on a pretax basis, it would
11 have come out on a pretax basis with the same conclusion as to
12 how much should be awarded to Frontier.

13 Q. Well, sir, you never performed the calculation on a pretax
14 basis; is that correct?

15 A. No, I didn't. But based on the manual on scientific
16 evidence, it points out that if the tax rates are the same, the
17 two methods give comparable results.

18 Q. But, sir, you never done the pretax calculation?

19 A. I haven't done that specifically, no.

20 Q. And this chart shows the amount to make Frontier whole, and
21 a calculation of taxes at a rate of 22.8 percent on that
22 amount, correct?

23 A. No, that's not what it says. The amount to make Frontier
24 whole on an after-tax basis is 35 million. And in order to
25 leave Frontier with 35 million on an after-tax basis given that

O4ABFRO4

Neels - Cross

1 it will have to pay taxes on the award, the amount that should
2 be awarded is 46 million. The tax is on the award, not on the
3 amount required to make Frontier whole.

4 Q. I just want to be clear on this, sir. Is it your opinion
5 that the Court in this case should award not only damages, but
6 the taxes that may be paid on the damages award?

7 A. I'm not sure. Again, the taxes are calculated not by
8 applying the tax rate to the after-tax value of payment
9 required to make Frontier whole, but rather taking into account
10 the taxes that would have to be paid on the award itself to
11 leave Frontier with that 35 million.

12 So when you keep talking about paying taxes on the
13 amount to make Frontier whole, I don't really see it that way.
14 I see it as taking into account the taxes so that after taxes,
15 Frontier is whole on an after-tax basis.

16 Q. Aren't those the words that you use in your report, payment
17 required to make Frontier whole and taxes to be paid on damage
18 award?

19 A. The amount required to -- well, yeah, I do use those words.

20 Q. And, I'm sorry, I want to -- I should have asked this
21 directly after. I asked you a moment ago. Is it your opinion
22 that the Court should award not only damages, but the taxes
23 that may be paid on those damages, and I think your answer was
24 you're not sure. Is that correct?

25 A. I'm trying to answer your question. I think the tax should

O4ABFRO4

Neels - Cross

award damages in an amount such that Frontier is made whole.

And in calculating that amount, one of the things that has to be taken into account is that part of the award will be paid out in taxes. So in order to make Frontier whole, one needs to take those taxes into account.

Q. Did you know how to answer that question when I asked it at your deposition?

A. I thought I did, but perhaps I may have misspoken.

Q. Let me show your deposition transcript page 123, beginning at line five. And this is the end of a question. Let's go to the preceding page to make sure I get the whole question. We can always read the whole thing in, I want to focus your attention on the question that begins on line five.

I asked you: An then you assume though that the Court will award the future income taxes that Frontier will pay on the damages report. Is that correct?

And what was your answer, sir?

A. I said that's correct.

MR. HOSENPUD: Excuse me, your Honor. For fairness the next question and answer should be read.

MR. BUTLER: That's fine. I'll be happy to read it.

Q. The next question is, Because otherwise Frontier would have to pay damages on its damages award, and it would be a little worse off, perhaps, than it otherwise would be; is that right?

Answer. That's right. It would not be made whole.

O4ABFRO4

Neels - Cross

1 Did you give that answer as well?

2 A. I did.

3 Q. Was it your testimony at your deposition that you were
4 recommending to the Court not only to award damages, but taxes
5 payable by Frontier on those damages?

6 A. Well, I mean part of the difficulty I'm having, it's a
7 little bit semantic. But I think the damages award is what is
8 required to make Frontier whole. I think of the taxes as part
9 of the damages, not as something on top of the damages, that's
10 where we're struggling back and forth.

11 To make Frontier whole, you want to leave Frontier
12 after tax with enough money to make up for the losses it
13 experienced on an after-tax basis. So part of that means
14 you're putting it back in the position it would have been, and
15 you're recognizing that the award itself will be taxable, and
16 taking that into account to come up with the overall amount,
17 the overall damage award required to make Frontier whole.

18 Now to sit here and try to separate the damage award
19 from the taxes on the award and I see the taxes as part of the
20 award, that's just part of what one needs to do to make
21 Frontier whole.

22 Q. To calculate that amount you use the rate of 22.8 percent,
23 correct?

24 A. I did.

25 Q. If there's a damages award in this case, when do you expect

O4ABFRO4

Neels - Cross

1 it to be paid to Frontier?

2 A. I don't have a specific opinion on that.

3 Q. Would it be sometime this year or later?

4 A. Sometime this year or later, yes.

5 Q. And do you have any way of knowing what Frontier's
6 effective tax rate is going to be in this year or any later
7 year?

8 A. I do not. Although as I will repeat as I have said on
9 multiple occasions today, what's relevant is the incremental
10 effect on Frontier's taxes of the award, not the overall
11 average tax rate paid by Frontier which is not necessarily a
12 good measure of what the incremental tax rate would be.

13 MR. BUTLER: Thank you very much, Dr. Neels. I have
14 no further questions.

15 THE COURT: Dr. Neels, if Frontier had been able to --
16 there'd been no breach, things had gone as planned and it was
17 able to earn the money in the open market, there would have
18 been a tax on that money, wouldn't there?

19 THE WITNESS: It would have, yes, your Honor.

20 THE COURT: Why is it any different whether it's
21 earned on the market or earned to remedy a breach as far as the
22 imposition of the tax?

23 THE WITNESS: Well, I don't think there is any
24 difference.

25 THE COURT: Excuse me.

O4ABFRO4

Neels - Cross

1 THE WITNESS: I don't think that there is a difference
2 because, as I said, if you're looking at things on an after-tax
3 basis, you recognize that the tax effect muted the harm to some
4 extent because part of it --

5 THE COURT: But if it earned it in the market, it
6 would pay the tax routinely.

7 THE WITNESS: That's correct, yes.

8 THE COURT: And now since it obtained the money as a
9 solation instead of a salary, why should the tax effect be any
10 different?

11 Why should they be compensated for the tax which they
12 wouldn't have been if they earned it?

13 THE WITNESS: I think if I had -- we've talked about
14 the pretax approach and the after-tax approach. Using an
15 after-tax approach, I've essentially adjusted the injury to
16 account for the tax effects. If the award doesn't recognize
17 the fact that it would be -- that the award will be taxable,
18 then in fact you're putting another tax on top of earnings that
19 have already been reduced because of tax. Because, I mean, if
20 I were -- if I had ignored taxes entirely, I would have talked
21 about what's earned in the market. I would have ignored tax
22 effects. But if damages were awarded, that's when the taxes
23 would be paid on those earnings.

24 But because I calculated taxes along the way, in
25 effect they'd already been paid, and to not take into effect

O4ABFRO4

Neels - Cross

1 the taxes on the award means you're basically taxing those
2 earnings a second time.

3 THE COURT: Thank you.

4 MR. HOSENPUD: Your Honor, would this be a good
5 stopping point? We're at the 5:00 hour.

6 THE COURT: Yes. Is everybody through with Dr. Neels?
7 Is he excused or will he be back tomorrow?

8 MR. HOSENPUD: He'll be back tomorrow with some
9 rebuttal, your Honor.

10 THE COURT: That's the answer to that. See you
11 tomorrow morning.

12 MR. HOSENPUD: Thank you, your Honor.

13 (Adjourned to April 11, 2024 at 11 a.m.)
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